Exhibit 36

03-20-00008-CV

REPORTER'S RECORD
VOLUME 3 OF 4 VOLUMES
TRIAL COURT CAUSE NO. D-1-GN-19-004651
COURT OF APPEALS NO. 03-20-00008-CV

NEIL HESLIN, Plaintiff VS. ALEX E. JONES, INFOWARS, LLC, and FREE SPEECH SYSTEMS, LLC, Defendants	)	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 261ST JUDICIAL DISTRICT

HEARING ON MOTION TO DISMISS AND
MOTION FOR SANCTIONS

On the 18th day of December, 2019, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Scott H. Jenkins, Judge presiding, held in Austin, Travis County, Texas;

Proceedings reported by machine shorthand.

A P P E A R A N C E S

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I N D E X

VOLUME 3

HEARING ON MOTION TO DISMISS AND MOTION FOR SANCTIONS

DECEMBER 18, 2019

DEFENDANTS' WITNESSES

EXHIBIT INDEX

DEFENDANTS' NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
1	Declaration of Mark Bankston	92	92	3

PROCEEDINGS

THE COURT: We are on the record in Cause No. GN-19-4651 styled Neil Heslin vs. Alex E. Jones, InfoWars, LLC, and Free Speech Systems, LLC. Would you announce your presence for the record beginning with counsel for plaintiff.

MR. BANKSTON: Mark Bankston on behalf of the plaintiff.

MR. OGDEN: And Bill Ogden on behalf of the plaintiff.

MR. JEFFERIES: Wade Jeffries and Michael Burnett on behalf of the defendants.

THE COURT: All right. Thank you, Counsel. We just had a very collegial discussion before going on the record to confirm our order of business in this hearing. This is a resumption of the hearing that was initiated or started in October on defendants' motion to dismiss. It's the motion that was filed on September 6th. Plaintiff filed a response on September 30th. We had a hearing in October, following which -- we also had a hearing on defendants' Rule 91a motion to dismiss. We all agree that is under advisement. There will be no additional argument on the 91a motion today. We're here exclusively following the order which I issued that was filed on October 18th,

order on plaintiff's motion for expedited discovery, et cetera.

You've gone forth to do some discovery. You're now back to resume argument on the motion to dismiss. And in addition, there is a new motion filed, which is plaintiff's motion for sanctions and motion for default judgment, all one motion, filed a week ago Monday to which defendants filed a response late last night and again early this morning both of which I've read. I've read both responses. Of course, I read the motion for sanctions. I won't say I read every one of the 600 and some-odd pages attached to the motion for sanctions, but I read salient portions, particularly, for example, Exhibit 24 was referenced by one of you about the do not destroy letter that was actually sent in another case, not in this case. But I went and looked at that because I thought you'd want me to be prepared for that. In addition, of course, I read the *Brookshire* opinion which you both discuss in your motions for sanctions.

So I've read this. And now you wish to make some brief argument. You've agreed that you don't need a lot of time for argument, but you do want to put on three witnesses. I was told by counsel for defendants you want to put on basically just three

lawyer witnesses. You, right, Mr. Jeffries?

MR. JEFFERIES: Correct.

THE COURT: And also Mr. Burnett and counsel for plaintiff.

MR. JEFFERIES: Correct.

THE COURT: Just those three witnesses.

MR. JEFFERIES: Correct, Judge.

THE COURT: You wish to make a brief argument on those motions. We've agreed that because the defendants have the burden of persuasion on the motion to dismiss, which is the main motion, and because the motion for sanctions is inextricably intertwined with that, that the defendants will get the last word.

And I understand plaintiffs filed supplemental exhibits at 10:00 a.m. this morning. You'll have to walk me through that because I had two different family law cases this morning, so I've read all of this in my spare time last night and on breaks today.

So with that, that's what we have before us. And I think I told you at the beginning because these cases have been extensively argued -- the *Scarlett Lewis* case was an IIED case also. And I also have *Heslin 1.* And no one for a minute could think that if this case is ever tried it's not going to be a single

case, Heslin against the defendants. We discussed that at the prior hearing too. And because I've heard extensive arguments on all these different claims, *Heslin 1* being a defamation case, *Heslin 2*, the case today, being an IIED case similar to *Scarlett Lewis*, I'm going to be uncharacteristically quiet. But I must say many of the questions I posed and observations made in these other cases are pertinent now and I don't -- I just don't think I need to repeat them.

So that's what I plan to do. With that, I'm going to turn it over to you. And you've agreed that with your witnesses and argument and everything you will confine every bit of time you're going to use today in an hour and 20 minutes for the defendants and an hour and 20 minutes for the plaintiff. Is that correct?

MR. JEFFERIES: That's correct, Judge.

MR. BANKSTON: Yes, Judge.

THE COURT: I will keep track of your time. I'm not going to micromanage how you use it. But we all agree that the defendants, getting the last word, the final few minutes of this case this afternoon, you will not get more than just a few minutes to get the final word, five, ten at most. Agreed?

MR. JEFFERIES: Agreed, Judge.

THE COURT: All right. With that, I'm

going to keep track of the clock now, and you may proceed.

MR. JEFFERIES: Okay. Judge, just briefly, may it please the Court. Again, Wade Jefferies. As you know, I'm relatively new to this case. Anyway, I read the transcript of the prior hearing on motion to dismiss and the TCPA motion that was back in October. That was continued when the judge ordered discovery under the TCPA motion. So again, very brief argument on that issue. I did want to point the Court and I provided your staff attorney with a copy of a case. I didn't see it cited in any of the pleadings, but I do think it's relevant to our TCPA motion. That's the *Creditwatch, Inc. v. Jackson* case, Supreme Court of Texas, decided February 25th, 2005.

THE COURT: I believe that case has been cited among all of the Sandy Hook cases. It was cited somewhere because I remember it.

MR. JEFFERIES: Okay. And, Judge, bear in mind, I'm still playing catch-up on all four of these, so I apologize if it's already been cited.

So again, the reason I wanted to bring that up is when I read the transcript of the prior motion that Mr. Burnett was arguing, you know, one of his big pushes for the motion is, Judge, IIED is a gap

filler and isn't appropriate for Mr. Heslin because he already has a defamation case on file in '18.

THE COURT: For some conduct, but not for some of the conduct alleged in *Heslin 2*.

MR. JEFFERIES: That's correct. However, my reading of *Creditwatch*, et cetera was that's irrelevant. He has got a claim on file. And according to *Creditwatch*, again, you know -- basically *Creditwatch* is a sexual harassment claim. She tried to bring various actions under the Human Rights Act Commission --

THE COURT: But wasn't it the same conduct for which they were being sued?

MR. JEFFERIES: It was the same conduct.

THE COURT: And isn't that distinction in this case? I told you I wasn't going to ask questions, but here I am doing it anyway. I guess I just can't help myself. You see my question.

MR. JEFFERIES: I see your question, and let me try to answer it to the best of my ability.

THE COURT: And I think we discussed this in October too.

MR. JEFFERIES: Okay. Yes. And, Judge, the reason I think there is a distinction is because when she filed -- or excuse me -- when he filed his case in '18, he knew of the conduct now complained of, okay?

So again, just because he had ability, regardless if it's barred by the statute of limitations, he waited to file, et cetera, if he had an alternate route that he could have filed a lawsuit on, and even if he didn't do so -- let's assume he didn't even file *Heslin* in '18, okay? Since clearly he's got a defamation cause of action according to him that he's pled and he's argued, whether or not he wins, loses, is barred by the statute of limitations, at the end of the day it doesn't matter. According to *Creditwatch*, just because other avenues may be barred, that doesn't give him a right to file an IIED claim.

THE COURT: Well, let's assume it's all one case because we all know if this case is ever tried it will not be -- there will not be a *Heslin 1* trial and then a *Heslin 2* trial. There will be one *Heslin* trial.

MR. JEFFERIES: It will be consolidated.

THE COURT: Exactly. I think we all know eventually it will be consolidated. I'm even getting some affirmation signs from the plaintiff's side as I say this. So let's assume it's all one pleading. Your argument is because there are different discrete conduct by the defendants, some of which cannot give rise to a defamation case, even -- because there are some -- there's some conduct that does give rise to a defamation

case, no one can ever sue for IIED for separate and discrete conduct, separate and discrete acts that are not defamatory acts but instead could arguably be an IIED claim.

MR. JEFFERIES: Your Honor, I would disagree that in this particular case they couldn't sue under those things for defamation. That being said, my argument would be -- my follow-up argument would be the acts they allege of in their petition as a matter of law don't rise to the level of outrageousness.

THE COURT: That's a different argument.

MR. JEFFERIES: No, it is a different argument.

THE COURT: All right.

MR. JEFFERIES: But again, sort of addressing both, you're required to have an IIED case. And specifically, again, in *Creditwatch* the Court states we certainly understand judicial reticence to dismiss claims like this one stemming from heinous acts, but except in circumstances bordering on serious criminal acts, we repeat that such acts will rarely have merit as intentional infliction claims.

So, yeah, that's my only argument, Your Honor. I wanted to bring the cases. It sounds like the judge has already read it and is familiar with

it. But yes, my argument would be under either scenario, *Heslin 2* as a matter of law is not proper to go forward and should be dismissed. Okay.

THE COURT: Anything else on the motion for sanctions you wish to say before we get --

MR. JEFFERIES: Oh, I --

THE COURT: -- before we go to evidence?

MR. JEFFERIES: Absolutely, Judge, just briefly.

THE COURT: Go ahead.

MR. JEFFERIES: Particularly, the first part of the motion for sanctions is basically that my clients spoliated evidence, okay? And I understand the Court's read the file, et cetera, 615 some pages of exhibits, but a couple of small things I do want to point out to the Court that I think is very important. One is I think that they seriously misrepresent Mr. Zimmerman, who is the IT professional who testified.

THE COURT: I read your response that there are all these backups --

MR. JEFFERIES: Correct. Correct.

THE COURT: -- and the data is still there.

MR. JEFFERIES: Correct. And in fact, the issue I've got and what I want to point out to the Court

is, you know, they basically quoted a very -- they misquoted him in their motion for sanctions and I take issue with that. And they basically misquoted him saying they took no efforts to secure their server prior to April of this year when he made a -- when he did a full backup of the email server. It starts on Page 34 of the motion, Judge, for sanctions. Here we go. I'm sorry. It's on Page 31.

On Page 31 at the bottom about ten lines out they state IT director Michael Zimmerman testified that the first time Free Speech Systems, LLC took any effort to preserve its email server was at the beginning of this year during discovery in *Lewis* almost a year after it's been sued, and then they cite to his deposition.

That is just a false misrepresentation to the Court. His deposition testimony, which is in the 618 pages, but if you look starting on Page 39, the question asked is, Question by Mr. Ogden: Earlier you testified that the email backup was done in January of 2019, correct?

Answer: January, February, sometime earlier this year.

Question: At no point between April of 2018 and that time were steps taken to preserve any

evidence?

His answer: Periodic backups of the email system were done frequently.

Okay. Why then would you need to build a backup other than the periodic backups?

His answer: Searching on the server itself is very time intensive. With 9.6 million emails or 9.3, somewhere in that range, it is a lot more effective to pull that over to a different system than to perform the searches on the system.

Question: So the backup that was done earlier this year, that was just for the availability to help you search all these --

Effectively, yeah.

Okay.

So, again, it's clear from the transcript what he did was he created a copy of their email backup in order to more efficiently try to find these emails.

THE COURT: It's easier to search. I understood.

MR. JEFFERIES: Okay. Yes, they're representing in their motion that he spoliated the evidence, so I think that's an important point to make.

They then go -- they also indicate in their motion, and I'm sure you've read it in

Mr. Zimmerman's affidavit, that from time to time computers need to be repurposed. And Mr. Zimmerman even testified that when that happened he would in fact reload a new operating system and new program files onto those new computers, okay? Well, obviously the follow-up question was asked, and that's addressed in Mr. Zimmerman's affidavit, that the employees at Free Speech Systems, which is the parent company that owns InfoWars, so whether you call it Free Speech or InfoWars -- the employees all have portable hard drives where the data is kept. So the mere fact that you'd go when you've got an aging computer or a hard drive or something that happens to that computer and you repurpose that computer or even replace that computer, there's no evidence there whatsoever of any data loss or spoliation. Based on Mr. Zimmerman's affidavit, it's clear they use external hard drives that still exist. Again, no evidence of spoliation. I think that's critical.

They then talk about that we deleted various data from internal chat systems that the employees used to communicate. There are two that are referenced in this case, Your Honor. The first one is called Slack messaging system. And again, that's the interim. And the second one is Rocket.Chat. Okay. And

again, Mr. Zimmerman's affidavit makes clear after his deposition, after I was involved in the case and I met with him, he's still able to access the Slack data. So none of that's been destroyed. That is still available and recoverable, so we don't have a spoliation issue there. Likewise on RocketChat, same thing, all the data has been preserved.

So, again, on the spoliation claims, Your Honor, I just want to address there is no proper evidence before the Court that in fact any spoliation has occurred. The last issue on that is they argue that because the YouTube video archive has been deleted -- or is no longer available to my client, that that somehow constitutes spoliation. Again, it's my understanding -- and, in fact, Mr. Zimmerman's affidavit states clearly that everything that was uploaded to YouTube, Free Speech Systems or InfoWars still has on their servers, so that data is still available.

Furthermore, regarding their argument regarding spoliation that we were somehow negligent or intentionally allowed data to be destroyed when we didn't do a backup of Facebook and some of the other third-party accounts before this new platform, again, *Brookshire* is clear. For spoliation to occur, one of the things the Court should look at is to determine

whether or not that evidence is available from the third-party source. So we've got the YouTube. That's clear from Mr. Zimmerman's affidavit. As far as Facebook, Twitter, et cetera, my guess is once an issue -- a subpoena is issued to those third companies, that that is going to be there.

As the Court knows, in 2019, once data has sort of been uploaded onto the Internet, it rarely goes away for good. So I'm confident that it's going to be found; and therefore, spoliation shouldn't apply. So briefly I just wanted to address all the issues, Judge.

I will now call Mr. Burnett to the stand.

THE COURT: Well, before you do that, you might want to address -- and they get to argue first before you start calling witnesses.

MR. JEFFERIES: Okay. Fair enough.

THE COURT: So I'll let them do that.

MR. JEFFERIES: Okay.

THE COURT: But you addressed the spoliation. What you didn't address that was disconcerting to me is the -- my order says that Free Speech Systems must produce a corporate representative -- this is on October 18th, the order -- who is prepared to testify about the following topics. And the first one is the sourcing and research for the

videos described in plaintiff's petition. And my reading of this indicates that corporate rep wasn't prepared to discuss any of that, was just completely -- and I'm sorry to pick on your co-counsel at the table, but some of the questions suggested I didn't understand I was supposed to do this. And that is a --

MR. JEFFERIES: Yeah, and --

THE COURT: That to me struck me as a massive failure to communicate. I don't know why it happened, but I found it very disconcerting since the order was so specific about that.

MR. JEFFERIES: Understood.

THE COURT: And that isn't spoliation; that's just declining to follow a court order and produce the discovery that's ordered.

MR. JEFFERIES: I understand.

THE COURT: Do you see what I mean?

MR. JEFFERIES: I understand completely, Judge.

THE COURT: All right.

MR. JEFFERIES: And let me respond to that. First of all, Mr. Burnett had nothing to do with that. I said first of all -- first of all, I'm sure the Court has read in their motion for sanctions and for default judgment that Mr. Barnes was terminated the

night before those depositions. Robert Barnes.

THE COURT: Yes.

MR. JEFFERIES: Okay, okay.

THE COURT: But Mr. Burnett was at the hearing in October --

MR. JEFFERIES: He was at the hearing, but Mr. --

THE COURT: -- and when I issued this discovery order, right?

MR. JEFFERIES: That's correct, Your Honor.

THE COURT: I just don't think the discovery order could be any more clear. It's at the bottom of Page 1. It's just like clear as can be what you're supposed to do.

MR. JEFFERIES: Correct.

THE COURT: So why wasn't it done, is my question?

MR. JEFFERIES: I can't answer that. It should have been done. I don't think any fault goes on Mr. Burnett. Again --

THE COURT: Well, it's somebody's fault. I think we can agree it's somebody's fault and that part of the order was not complied with.

MR. JEFFERIES: I agree, Judge.

THE COURT: Do you agree?

MR. JEFFERIES: I agree.

THE COURT: I appreciate that.

MR. JEFFERIES: I agree with that, Judge. There's no way to argue around that. If I could I would. I may could give it a best shot, but you're right. I mean, the reality is he was unable to answer the questions at the deposition. The transcript is clear on that point.

THE COURT: Well, good lawyers fall on their swords --

MR. JEFFERIES: Okay.

THE COURT: -- or have their clients fall on their sword. So the order was not complied with. Now the question is: What is the remedy for that?

MR. JEFFERIES: Sure.

THE COURT: And their motion for sanctions, even if I don't go with them on spoliation, you basically just conceded, well, the plaintiff is right, they didn't comply with the court order under 4(a), for example --

MR. JEFFERIES: Correct.

THE COURT: -- and so a sanction must flow from that, right? What should it be?

MR. JEFFERIES: Sure. Well, first of all,

it definitely should not be the death penalty sanction. I do want to point out this is the first motion for sanctions in this case.

THE COURT: I understand.

MR. JEFFERIES: I know there were some others in --

THE COURT: And I read *Transamerica* many years ago and I went back -- thank you for making me do it -- and reread *Brookshire* last night at home.

MR. JEFFERIES: Okay. Okay.

THE COURT: It was very interesting. It's a long opinion.

MR. JEFFERIES: Yes.

THE COURT: So I read that and I understand. You know, the end sanction, that there's a continuum and courts should really consider -- if there's something less draconian on the continuum that will accomplish the same purpose, I'm supposed to do that.

MR. JEFFERIES: Right.

THE COURT: I'll pick on the other side about that. So it's not default. What is it?

MR. JEFFERIES: I would argue, Your Honor, that the appropriate sanctions would be a ruling that as a result of that they meet their *prima facie* burden

under the TCPA.

THE COURT: Well, wouldn't that mean you wouldn't have any basis to appeal it then? In other words, if I deny the motion -- so that means I should deny the motion to dismiss. If they had met their *prima facie* burden, the motion should be denied.

MR. JEFFERIES: Well, Your Honor, we still have under the TCPA motion -- if your decision regarding sanctions is a result of the corporate rep not being prepared, under the TCPA rules, even if you say because of that they've met their *prima facie*, I've got the right to argue affirmative defenses.

THE COURT: I get that. And that gets back to your legal arguments --

MR. JEFFERIES: Bingo, correct.

THE COURT: -- that you believe are dispositive.

MR. JEFFERIES: Correct.

THE COURT: I understand your position.

MR. JEFFERIES: Okay. Thank you.

THE COURT: And I appreciate that.

MR. JEFFERIES: Okay. Sure. Thank you.

THE COURT: So really I could do much of what -- like what was done in *Heslin 1* --

MR. JEFFERIES: Correct.

THE COURT: -- because under Rule 215 one can presume that had that discovery been complied with, had -- I guess it was Rob Dew who didn't have a clue how to answer the questions, and so that corporate rep couldn't answer the questions and therefore you did not comply -- the defendants did not comply with 4(a) of my order, I -- that would lead to an order much like I did in *Heslin 1*, which is -- under Rule 215, you can presume that they met their burdens. Exactly what you just said --

MR. JEFFERIES: Right.

THE COURT: -- can go in the order.

MR. JEFFERIES: The Court clearly has the authority to do that, correct, Judge.

THE COURT: Okay. Thank you.

MR. JEFFERIES: And again, you know, my argument is -- and just to follow up and then I'll be done with my argument. It should be the last prong of their motion. You know, what do you do? They attempt, I think extremely inappropriately, to bootstrap in other cases into this case. I think under the *Brookshire* opinion it's clear that it's the Court's responsibility to look at the conduct of this case, certainly not the conduct that occurs out in the Connecticut lawsuit, but in this case and this case alone. As you know,

you know, in *Brookshire* and it's Texas policy that absent, you know, lesser sanctions moving forward, you want to try the case on its merits, not by default.

So now I understand that they get to argue, and then I'll put on my evidence? That's the way we're going to proceed?

THE COURT: Yes.

MR. JEFFERIES: Okay. Nothing further at this point, Judge.

THE COURT: Thank you. Do you wish to make an opening argument?

MR. BANKSTON: Yes, Your Honor. As part of the first part of it I'm going to present some slides to you to sort of get us up to speed.

THE COURT: Just argument slides?

MR. BANKSTON: Yes, exactly. PowerPoint, I think, yes.

THE COURT: Are these things that were attached to the motion or referenced in the motion?

MR. BANKSTON: These are visual aids of the exhibits that I filed this morning.

THE COURT: Ah, the ones you filed at 10:00 a.m. this morning.

MR. BANKSTON: Correct.

THE COURT: Okay. That's probably a good

thing to walk me through since it came in so recently.

MR. BANKSTON: Exactly. Exactly.

THE COURT: All right.

MR. BANKSTON: So I'm going to have Mr. Ogden bring up the PowerPoint. I'm hoping that's going to be up on your screen.

THE COURT: Yes, and it should be on the screen on counsel table too for their convenience.

MR. BANKSTON: Your Honor, may it please the Court. The elephant in the room is Robert Barnes. We heard from counsel -- it was asked, why didn't this get done? Why weren't they prepared? And the obvious answer to that is because Robert Barnes was totally responsible for that. The lawyers who were signed as attorney of record in this case did not have responsibility for that. They didn't do that.

THE COURT: Which lawyer appeared with the corporate rep for Free Speech Systems?

MR. BANKSTON: That would be Mr. Jefferies. Mr. Jefferies --

MR. JEFFERIES: *(Stood up)*.

THE COURT: It's not your turn. You'll get to speak again when it is your turn, but they're burning their time now. Go ahead.

MR. BANKSTON: That night before the

deposition, I got an email from Mr. Jeffries saying that he would be appearing and not Mr. Barnes and that he was then taking over control of the case. So from that night apparently when Mr. Jeffries had discovered that Mr. Barnes had completely botched discovery is when Mr. Barnes was officially terminated, or so we're led to believe, and Mr. Jefferies --

THE COURT: So what you're saying is I can infer that Mr. Barnes is the one who did not adequately prepare a corporate rep.

MR. BANKSTON: I believe that's true. I don't think there's any way you can infer anything else. I don't believe that you're going to have testimony from either of these counsels that they spent time with any of the deponents or did anything in terms of discovery.

What we had here is you remember we had Mr. Barnes back in *Lewis* who was *pro hac*. He didn't come do *pro hac* in this case because of what happened in our case, plus things that continued to happen over that summer. He didn't want to come back in front of this Court. So instead he found some local counsel who would just put the names on his discovery and that's what happened.

So I want to walk you through the history of how this came to happen and how it's been so harmful

to the plaintiffs to have an attorney who is not an attorney of record, is actually the person who's doing everything and is now beyond this Court's reach, because one of the important things about this motion, Your Honor, is you can't sanction Bob Barnes because he's not here. He's never been before the Court in this case. Let's go to the first slide.

THE COURT: And the other thing is courts are supposed to determine whether it's the client or the lawyer who is to be sanctioned.

MR. BANKSTON: Exactly. And I think that's going to raise a very interesting question on just who was Robert Barnes in this case, right? We're going -- the first thing I want to show you is an affidavit from March 22nd.

THE COURT: I also saw the most recent affidavit filed this morning by opposing counsel, at 7:30 this morning, an affidavit from Alex Jones saying Barnes was never an employee. He was an independent lawyer who appeared *pro hac*, as you say, and he's no longer in that role.

MR. BANKSTON: He's never appeared *pro hac* in this case, though.

THE COURT: Well, I know. No, but he did previously.

MR. BANKSTON: In a different case, sure.

THE COURT: What I'm saying is I read that affidavit, and he was just a lawyer appearing in court.

MR. BANKSTON: He was a -- they don't -- they've called him plenty of times on the record general counsel before. They no longer want to call him general counsel. The reason they don't want to call him general counsel is because they're afraid that's going to get a sanction of the party. Their hope is that they can get a sanction against Robert Barnes.

THE COURT: Well, whoever said that besides Robert Barnes himself?

MR. BANKSTON: Mr. Jones has said that multiple times.

THE COURT: Oh, in deposition.

MR. BANKSTON: Yeah, in both deposition and in the real world too has said that multiple times.

THE COURT: And of course, we'd have to understand when he said it he knew what that meant and that that somehow meant that whenever he said something he was speaking for the company as opposed to an independent counsel.

MR. BANKSTON: Sure. My only point on this, though, Your Honor, is that a party cannot escape sanctions by saying, oh, the actual responsible party is

this lawyer who never appeared in the case and was never before the Court and you should sanction that person and not the client or the current attorneys of record.

THE COURT: Well, but they've never made that argument. And in fact, opposing counsel just graciously conceded we didn't comply with your order, let me just fall on that sword right at the beginning; we did not; and therefore, some sanction can be levied for discovery, but it shouldn't be dispositive; it should be something along the lines of what I did in *Heslin 1*, which is actually, I thought, a fairly gracious admission. Why wouldn't that be enough?

MR. BANKSTON: Well, let's -- kind of going back to -- we're getting to the end of my presentation now.

THE COURT: I have a way of doing that.

MR. BANKSTON: I'll jump there for you, which is to say that if a party continually has orders from the Court to do something and it continually does the same thing over and over again, if you're just going to use the same sanction again, if you're not going to elevate your sanction, there's no deterrent effect whatsoever.

THE COURT: So what your argument is I've already sanctioned him in *Heslin 1;* I need to do

something more in *Heslin 2* because *Heslin 1* wasn't enough.

MR. BANKSTON: Especially considering what happened in *Lewis* and what happened in *Lafferty.* Yes, the Court can consider that conduct, and we'll get into that as well. That's a whole different legal thing we'll unravel. But to kind of -- like I said, to get to the end of what I'm saying is that the prejudice that's happened to plaintiffs is you'll remember that the first time the plaintiffs were able to have an opportunity to discover facts about their case, because the TCPA puts everything on hold, was in *Heslin 1* about a year ago. We missed that opportunity because they did this erroneous appeal. We tried again in *Lewis* to get facts about the case, couldn't do it there.

THE COURT: Well, you did get them in *Lewis*. In fact, you got a deposition in *Lewis*.

MR. BANKSTON: I got a deposition. But one of the things you'll remember is you never ruled on that motion for sanctions because they took it out from under you because they were in a bad spot. And had that hearing gone to conclusion, I think you would have agreed with me that that discovery is absolutely worthless, which is something you're also going to conclude with me as I go through my presentation today

about what was given to me in this case, because what was given to me in this case in terms of documentary evidence is exactly what was given to me in *Lewis*.

THE COURT: Is there a case in Texas where a previous order for sanctions on another completely separate case -- it is separate; these are different cases; you're the one who filed two different Heslin cases -- can be used to walk up the ladder of sanctions in *Transamerica* and do something more draconian because something in another case didn't work?

MR. BANKSTON: Yes. Again, skipping to the end, we're going to -- I'm going to get to two cases for you. And what those two cases are, they're actually -- if you think about it, they're cases you see all the time, and you see them especially common in federal court where you have very vexatious litigants, which as the Court says that is presented with evidence that a certain plaintiff has attempted a certain fraudulent act, a fraudulent type of -- and in the case that we're going to talk about it's about obtaining fraudulent temporary restraining orders and the plaintiff had a pattern of doing that through these courts, and in several prior cases they had done bad conduct, and that was presented to the Court.

THE COURT: But that wasn't a discovery

sanction.

MR. BANKSTON: No, that actually wasn't a 215 sanction, right. Right.

THE COURT: Exactly. I'm talking about is there law in Texas about basically the *Transamerica* analysis under 215, how you're supposed to pick a sanction that is appropriate to put the plaintiff -- put the discovering party in the position they would be in had the discovery been provided, which is what I think I did in *Heslin 1* and would accomplish the same thing in *Heslin 2*. Is there a case in Texas where you would go to a more draconian sanction in discovery under Rule 215 because of another order in another case that wasn't enough to get the party providing discovery to comply?

MR. BANKSTON: That is my belief, Your Honor. Yes, that's how I read that case.

THE COURT: What's the case?

MR. BANKSTON: Well, first of all -- I don't have the -- I'm going to get to it in the presentation. I have a case name. I don't have it memorized off the top of my head.

THE COURT: It's the federal court case about the vexatious litigant.

MR. BANKSTON: No. I have a Texas case about that as well.

THE COURT: Oh.

MR. BANKSTON: I do have a Northern District of Texas case, but I have a Texas case that's another one of these that is basically -- and again, not looking at it right now, I'm not totally positive it's 215, so I may need to look closer at that.

THE COURT: Okay.

MR. BANKSTON: But in terms of the test that you're given under *Cummings* and *Transamerica* and all this, it's not that you actually have to test a lesser sanction, but you must consider whether a lesser sanction would be effective. And in considering whether that lesser sanction would be effective, you can consider whether that party has had sanctions against them in the past in front of the court that we're talking about that has failed to make them act appropriately.

THE COURT: But, Counsel, we're not even yet on the merits of the case. We're simply at the threshold motion to dismiss stage.

MR. BANKSTON: Yeah.

THE COURT: And the only reason for the specified and limited discovery was so that you could make your *prima facie* showing.

MR. BANKSTON: You're absolutely right.

THE COURT: If by failure to produce the discovery, counsel's concession here today, that meets that burden, that gives you everything. In other words, you didn't even need this discovery. If they would have just stood up in October and said we will agree that every bit of this discovery will meet the burden that the plaintiff has to make a *prima facie* showing, we wouldn't have even needed discovery.

MR. BANKSTON: I see what you're saying, but I powerfully disagree with that.

THE COURT: Why?

MR. BANKSTON: Okay. Because the discovery that I was granted, right, isn't -- I haven't learned anything about my case yet that is in their possession, anything of real substance, and I'm entitled to that right. And now for two years is basically how long it's going to take me to even begin that, because they're going to walk away from here not giving me discovery.

THE COURT: It will be when we come back from the appellate courts and we're back to move toward a trial.

MR. BANKSTON: And everybody's memory is faded, all the qualities of the evidence has been degraded. They have used the TCPA as a sword to

successfully defeat my ability to discover my facts about my case for more than two years, which I have a strong belief are way worse than what I have in the petition that's before you. But that's the petition I have to go up on now. I have to go up on appeal on that petition. And I don't have what I was entitled to from discovery.

THE COURT: But one of the other --

MR. BANKSTON: And worse off, I'm prejudiced for the entire future of this case.

THE COURT: Then one of the other --

MR. BANKSTON: And counsel --

THE COURT: Excuse me. Let me get a question out if you don't mind. Then one of the other sanctions could be they are prohibited from presenting any evidence about sources, for example. If they don't show it to you now and they don't give it to you until two years from now, this case -- this motion could be held under advisement for the time when it comes back on the TCPA decision -- assuming you prevail on the TCPA decision and it comes back for trial, this court or the trial court could then decide, you know, we're going to issue more sanctions; you are prohibited, defendants, from offering any evidence about sources because, for whatever reason, you didn't give it to them in response

to a clear order telling you to do so. Why wouldn't that be a sanction that would work for you for trying your case?

MR. BANKSTON: I think that's very worth your considering. I'm not going to tell you that that's not a good sanction or that that's not somewhere you should end up. I think, again, the very -- one of the -- the very last slide you're going to see from me today is 215(b)(2) and all the list of the things you can do, and that is one of them. I think another one that's interesting to look at is having now completely spiked the discovery process for me, you can limit their ability to do discovery in the future, and that's another thing you can do that isn't merits based and isn't a default.

THE COURT: But it doesn't have to be done now, does it?

MR. BANKSTON: No, not all of your order needs to take effect right now.

THE COURT: In fact, the only part that really must occur now is the part which affects the decision on the motion to dismiss.

MR. BANKSTON: I would say that the other purpose of your order needs to punish the offender and deter similar conduct from other litigants; and

therefore, there must be a punitive effect that takes effect.

THE COURT: Well, you can have attorney's fees for wasted time preparing for depositions that were useless.

MR. BANKSTON: And this last one in *Heslin*, that wasn't -- the way it was done in *Heslin* wasn't enough of a deterrent because that was put to the end of the case.

THE COURT: But my point is that all --

MR. BANKSTON: They didn't care.

THE COURT: My point is that this ratchet of sanctions can be imposed by the trial judge when and if this case comes back. Because you're right on the motion to dismiss; if it's determined ultimately you're right and it comes back for trial, this whole list of sanctions can be given based on the very argument you're making now. Now we're two years down the road. Now I can't get the discovery that should have been provided in response to the order from October, and now I'm prejudiced by getting it two years late. I want an order that prevents the defendants from offering any evidence about sources.

MR. BANKSTON: I think that's true.

THE COURT: Okay.

MR. BANKSTON: Here's a couple of hang-ups I have about that. One is that it's going to be way easier for me to get that order from you now than it is coming back here six, eight, more than a year later --

THE COURT: But the --

MR. BANKSTON: -- and have you try to understand what happened and the same effect.

THE COURT: The posture is the same. The order is just -- it's only a two-page order.

MR. BANKSTON: No, I understand the posture is the same. I'm saying that if I come back in here, I'm not going to have a judge in front of me who is as familiar with -- that's going to be year-old facts to you, and I'm going to basically have to reargue the motion again and going to have to go through the entire steps. I just think from a judicial economy standpoint it would be nice to get one order now that also lets the parties know what's going to happen in the case.

THE COURT: Well, maybe, but you need to understand that trial judges like the judge who's going to try the case to be able to put their imprimatur on things because it determines how they're able to try the case.

MR. BANKSTON: Right.

THE COURT: So one thing I don't like to

do is hamstring a colleague who's going to have to conduct this jury trial with rulings -- by embedding rulings that constrain the trial judge. For example, you want a default on *Heslin 2*, which is only as to IIED claims. So if it goes up and comes back, the Court of Appeals is not going to rule on the default. We know that, right?

MR. BANKSTON: Yes.

THE COURT: You do know that.

MR. BANKSTON: Yes, they're not going to -- right. I wouldn't figure so. That wouldn't be how the procedure would work out. Right.

THE COURT: Right, because it's not a final appealable because it's only as to liability is what you're asking for, right?

MR. BANKSTON: Exactly.

THE COURT: So we'd have this interlocutory order embedded in there with a default on liability only. The Court of Appeals is not even going to look at it. They're only going to look at the motion to dismiss ruling. Then it comes back, and we've embedded -- so we don't get any advice from the Court of Appeals whatsoever. And it comes back to a trial judge who's got a liability finding on part of the case but not on the other, not on the first part, not on any of

the defamation allegations.

MR. BANKSTON: Except I will move for that upon return, though, obviously.

THE COURT: Well, but then you could move for that upon return along with considering a ruling on this motion for liability on the IIED.

MR. BANKSTON: No, I take your -- I take your meaning. I do.

THE COURT: I'm just trying to think about this in part practically.

MR. BANKSTON: I mean, that's where I'm kind of worried too, is that I know based on -- I mean, based on what their strategy has been in this case is to make sure you're not the trial judge, and I know that there's a substantial chance you won't be.

THE COURT: There's a good chance there will be a better one than me.

MR. BANKSTON: Maybe so, right? But I'm going to have to have some judge try to make sense out of what your proceedings were here, and that's why I'd like to get to as final or as close to done as I can. I do -- I understand exactly what you're saying, though.

THE COURT: Well, that's why this transcript maybe could be helpful to somebody who's trying to glean what it is I was thinking to navigate

this. And, you know, the pathway is how do we get to a jury verdict and how do we get to a final judgment one way or the other.

MR. BANKSTON: The only thing I would say about that is if you are thinking like I'm hoping you will after I'm done with my presentation that there is a possibility that you might default these defendants is that you come to the conclusion that there is no reason to force us to spend more legal fees on this. There's no reason for us to go up on a year or more appeals on both parties if this case needs to be defaulted.

Now, I do take your meaning that if you're looking at a lesser sanction than default, there might be benefit from you from your standpoint of saying I'm going to grant certain things as to the TCPA motion and attorneys' fees, but I'm going to wait upon remand to handle the rest of the motion. I can understand that.

THE COURT: But you kind of framed an argument for them at the beginning when you're suggesting it's really Mr. Barnes who's responsible for this train wreck, and then why should I default his client on liability because a lawyer -- you're arguing a lawyer malfeasance -- or a lawyer colossal mistake. Let me say it that way.

MR. BANKSTON: You couldn't have given me

a better opportunity to start my presentation.

THE COURT: Okay.

MR. BANKSTON: All right. So here we go. So now I'm going to actually dive into it. The first thing I want to show you is a March 22nd, 2019 affidavit from Alex Jones. You notice that there was an affidavit today sort of pushing him -- distancing himself from Robert Barnes.

THE COURT: I read that.

MR. BANKSTON: They've already tried this. They've already thrown Mr. Barnes under the bus. Right around the time just a -- just probably about a week before Mr. Barnes showed up into this court for the first time they filed this affidavit in *Lafferty*. And the thing was that *Lafferty* and *Lewis* were running about neck and neck, but Connecticut's anti-SLAPP is a little more generous in timelines, so it was slightly behind *Lewis*.

THE COURT: Was a deposition taken of Alex --

MR. BANKSTON: No, no deposition taken.

THE COURT: You've got to let me get my questions out. The court reporter is going to be so frustrated with us.

MR. BANKSTON: Sure.

THE COURT: When I ask a question, please let me finish it before you answer. I guess you answered it. No deposition has been taken of Alex Jones in any case other than the *Scarlett Lewis* case and *Heslin 2*.

MR. BANKSTON: With regard to cases filed about the Sandy Hook litigation, yes, Your Honor.

THE COURT: Thank you for that.

MR. BANKSTON: This affidavit was put at the same point that we were at with *Lewis* where they had not met deadlines to produce documents, all right? So at the same point as basically the eve of the *Lewis* hearing, this affidavit is put forward, which basically says from Mr. Jones I instructed Mr. Barnes to do these things; I instructed him to comply; I thought that he had complied; I had no idea; I've instructed this other attorney, Norman Pattis up in Connecticut, to take over and take care of everything in the case.

THE COURT: And this affidavit is part of your 600 and some-odd pages attached to this motion?

MR. BANKSTON: No. It's actually one of the supplemental exhibits filed this morning.

THE COURT: Filed this morning. Thank you.

MR. BANKSTON: Okay. In that hearing that

followed that affidavit -- that's the other exhibit that's in my supplemental exhibits. Mr. Norman Pattis got up in front of the Court and said these things. He said I was in an unstainable position where I was being given direction by Mr. Barnes to do things that I thought were unsupportable and the client needed to know that. The client has taken those steps.

All right. The client is aware of Mr. Barnes' behavior and what's going on and is actively throwing him under the bus in Connecticut in order to avoid a sanctions ruling.

He says: I'll be candid. I consulted my lawyer, who's Willie Dow, and I described the situation to try to find out what my ethical obligations were, and he basically told me I was in a very precarious situation. So I took the steps that I needed to take to protect myself, and the result is that Mr. Barnes is no longer in the picture and I am it.

Next slide. He said he's no longer corporate counsel and no longer has any role in directing this litigation because my view and my representation to the client was, based on what I saw in this case, if they continued to follow Barnes' advice, they'd suffer adverse consequences.

Next slide. You'll also remember around

this time is when Mr. Enoch stopped showing up to oral hearing in our cases and then he started to withdraw. Mr. Pattis was candid with the Court about why that was. He said that Enoch is local counsel in Texas to the Jones defendants and Mr. Barnes is *pro hac vice* counsel and there's been a struggle there. Candidly, Judge, what blew this into crisis mode for me and led me to consider withdrawing is I received a phone call and had my first communication with Texas counsel on Monday.

Next slide.

THE COURT: And you're reading from Norm Pattis again?

MR. BANKSTON: Yes, exactly.

THE COURT: In the Connecticut case.

MR. BANKSTON: In the Connecticut *Lafferty* case. And so as you'll remember, Mr. Enoch left the case and then there was just Mr. Barnes here in Texas.

THE COURT: I do remember. Let me tell both sides now you've each used 20 minutes, so you're each now down to one hour per side for every question of every witness and every argument you're going to make.

MR. BANKSTON: Thank you, Your Honor.

THE COURT: Go ahead.

MR. BANKSTON: The last thing that Mr. Pattis said to assure the Court is Mr. Barnes has

been eased out of the picture and will no longer be involved in the case. Of course, Mr. Barnes didn't mention any of this to us when he showed up to our hearings in Texas.

And if you could go to the next slide.

And what Mr. Pattis said was obviously not true. And this, as you see, is of the videos that they produced to me. All since the time of that affidavit Mr. Barnes has been appearing on InfoWars as general counsel discussing with Mr. Jones, threatening me, making a big scene, basically acting like this is all a circus and not taking it seriously. There's an episode saying that we're going to respond to the Sandy Hook show trials. This is all a period where they're not taking anything seriously.

They were able to get the extension in *Lafferty*, though. So they were able to have until June in *Lafferty* to be able to comply with the discovery orders. Mr. Barnes then is still now running everything even though the client's already thrown him under the bus. And Mr. Barnes at that point produces to the plaintiff's counsel, which I'm also in the sharing agreement on, a bunch of new documents. And at this point they'll have produced a total in *Lafferty* of 53,000 documents, all right? But *Lafferty* has a much

wider discovery scope than we did. They're getting these things called Google Analytics and marketing data --

THE COURT: Are they --

MR. BANKSTON: -- and all sorts of stuff.

THE COURT: I'm sorry. I interrupted you that time. Are they in a motion to dismiss stage or are they doing final trial discovery?

MR. BANKSTON: No, I'm getting that right now. They're actually still technically procedurally dealing with the anti-SLAPP. It's on appeal right now.

THE COURT: They still get discovery while it's on appeal?

MR. BANKSTON: Well, no. You'll see in a minute as I get through these slides, okay?

THE COURT: Okay.

MR. BANKSTON: This is right now about May to June. They're still waiting to answer their discovery, okay, in *Lafferty*. They've been given one extension past *Lewis*. So they actually do. They end up producing some documents. The anti-SLAPP at this point is still waiting to get ruled on. All right. They produce the documents, these 53,000 total at this point. What I'm sure you've read in the motion is at that point plaintiff's counsel up in Connecticut discovered that

what we've been given had child pornography in it. Okay. At this point Mr. Barnes is still managing things.

So right after this one before the *Lafferty* hearing, I want to show you the other final supplemental exhibit I filed, which is a short video. And this is three minutes that I'm going to show you from a video that was published by Mr. Jones directly after this. And it's in the PowerPoint.

Yes, next slide. This was a video Mr. Jones published directly after the production of the meeting, basically a call where plaintiff's counsel called up Mr. Jones and said we found this, let's set up a meeting with the U.S. Attorney's Office and we'll get this figured out.

Mr. Jones did not react well to this. I'm going to show you this video, and I'm going to warn you this video is incredibly profane. And it's performatively so. And what I think you're going to see about this video is at this point in the proceedings Mr. Jones is not taking these proceedings seriously. He is using them as a world wrestling entertainment type event and is placing everybody at risk for it and is at this point even obviously still not taking discovery seriously. So let me show you this video and we'll talk

about what happened afterwards.

(The video was played)

THE COURT: Who is that?

MR. BANKSTON: The gentleman laughing at the end is Mr. Jones' attorney in Connecticut. That's Norman Pattis who, just like Mr. Barnes, started to make appearances on InfoWars with Mr. Jones.

THE COURT: He's the one who made the statement that Barnes had put him in a compromised position?

MR. BANKSTON: Exactly. Exactly. And in fact, what you'll also learn is that none of those statements that he was making to the Court appeared to be true because Mr. Barnes was still completely involved and did all the discovery.

In fact, if you go to the next slide, the very next thing that happens is on June 19th, 2019, Judge Bellis in Connecticut strikes their motion to dismiss. And that discussion was about how Mr. Barnes had botched that discovery.

THE COURT: I'm sorry. That discussion was -- say it slower.

MR. BANKSTON: That discussion was about how Mr. Barnes had botched discovery.

THE COURT: Okay.

MR. BANKSTON: In that hearing -- you'll see some of it quoted in our motion and there's a transcript for it. Judge Bellis says, look, even if you disregard that video we just saw, even if you disregard that child pornography that was produced in discovery, even if you disregard that there was an affidavit from Mr. Jones submitted that wasn't actually signed by Mr. Jones in that case, that even if all of that is disregarded, they had fundamentally and egregiously violated the discovery orders with total disrespect. And the Court said I'm striking everything and got really close -- considered doing a default and said I'm not going to do a default now, but I can't make this any more clear; if you keep this up, you're done; you are not taking this lawsuit seriously.

Next slide. The next thing that happens is we get the discovery -- the discovery -- the case comes back in *Heslin 1.* And that's the case where they had done no discovery at the time and then did no discovery before. So here you end up granting our motion and ended up giving the findings that you did and giving $25,000 in attorneys' fees.

THE COURT: Well, you didn't make a move after it came back on remand to have that order for discovery enforced in any other way, as I recall, in

Heslin 1.

MR. BANKSTON: Yeah, we had a discussion about that in the court about how if the appeal had never happened, which fundamentally it didn't because there was no jurisdiction, upon filing the motion for sanctions and then to the point of the hearing, I wouldn't have filed anything else, so there was nothing intermittent in there, but we had a pending motion for sanctions. But one of the things you did in that case was say, all right, we're only going to do attorneys' fees for the attorneys' fees that were spent in *Heslin 1* in 2018 during that period, so you kind of limited it there.

But essentially we got an order there that had the two basic -- the first most basic elements of 215. And we had the award of attorneys' fees, which were mandatory. And then we had an evidentiary finding, which is not exactly what 215 contemplates, because 215 actually contemplates an evidentiary finding for the purposes of the action. Now, your order did it for the purposes of the motion, which I think -- I don't have any authority for it but I think is still fine. I think you're totally empowered to do that. Because I think 215 kind of gives you a catch-all, you can do whatever is just.

THE COURT: Well, obviously I decided that I was empowered to do it --

MR. BANKSTON: To do it, sure.

THE COURT: -- because I did it.

MR. BANKSTON: Because you did it, exactly.

THE COURT: And I haven't changed my mind since then.

MR. BANKSTON: And I feel like we're going to be fine at the Court of Appeals on that too. So in other words, those are remedies I think you can take today without hesitation. But again, to me, that's the floor. If you have a defendant who's acting this way, who is not responding to any forms of deterrence whatsoever in the case, has now seriously compromised the state of the evidence, there must be some sort of elevated sanction here. So I'd like to walk through a little bit --

THE COURT: Which can occur now or on remand to prepare for trial.

MR. BANKSTON: Either way, yes. And we'll get to how that plays out at the very end here. I do want to go through the allegations of what discovery abuse was committed in this case because not much of it has been talked about. So the first -- the first point

here is the corporate representative. And you're on that. I don't think I need to say another word about that. The thing that's egregious to me is that he's the same one who wasn't prepared last time --

THE REPORTER: Can you slow down? It's getting really hard.

MR. BANKSTON: I'm very sorry.

THE COURT: Yeah, you really can't get a record the way you're going.

MR. BANKSTON: Yeah, I understand. We know that last time Mr. Dew wasn't prepared, and he wasn't prepared this time, and it was by the same group of counsel. They absolutely knew what their duties were. This is an intentional act of discovery abuse. But the one that didn't -- that wasn't addressed in their response. They didn't even answer it.

The next one is that Mr. Jones didn't respond to written discovery in good faith. If you look at the actual written discovery responses that are given in this case, they're absurd. They say we can't identify any of the employees who worked on this, we don't know any of our sources, we can't -- we don't basically know anything.

THE COURT: But can't you just hamstring them at trial, and wouldn't that be your dynamite at

trial? They can't even defend themselves on sources. They can't even tell the jury there are sources if they don't produce them in discovery. That could be one of the remedies.

MR. BANKSTON: I think -- I think it helps to have -- the problem is I've been on these cases long enough and they're going to go forward and they're going to have a new answer. And yeah, I'm going to be able to impeach them at trial, but I'll have been denied discovery on it the entire time, and they're going to have a new answer and somebody's going to let them testify to it.

THE COURT: Well, even when they come up with the source, does anybody seriously think the source is going to explain, you know, the basis for saying that children weren't killed?

MR. BANKSTON: Oh, I think it's much more than that actually, Your Honor. I think not only can you use who their sources were and what it was to prove that they acted recklessly false, but I think once I start discovering who those sources are and what they did together, I'm going to discover other things that they did to these parents.

THE COURT: Well, and that's the point. If you finally get -- when you finally get the

discovery, your point is it's going to be an even better trial for me, even if I get it late, because I'm going to be able to use those sources to show the absurdity of their statements is what you're saying.

MR. BANKSTON: I don't see why you at this point would have any faith that I'm getting any discovery on this point ever. They don't have it, and they will not give it. And no matter what this Court does they don't give it.

THE COURT: Well, and then you get back to the point that you can't give it to the jury then. If you don't give it during discovery and if you don't give it when it's reasonably available to you, which is really now, right now, you can't -- and you can't explain why you waited so long to give it, you can't use it at trial.

MR. BANKSTON: I think that's a good order. I think that's good.

THE COURT: Okay.

MR. BANKSTON: I think that needs to be firm. You know, it needs to be not that I'm suddenly ambushed at trial by new explanations of what these things are when, when the discovery was fresh and available, they didn't make the efforts to go do it.

THE COURT: Okay.

MR. BANKSTON: And now they've had four times to do it.

Move to the next one.

The next one is they broke their own Rule 11 agreement. Never mentioned it. They just didn't respond to that. They made a Rule 11 agreement about the discovery and about the production of *Lewis* documents. They just simply ignored it. Mr. Burnett made that agreement and then Mr. Barnes apparently did not follow through on it.

Next one. They relied on the deficient *Lewis* production for the request for production. So in the request for production in this case I got 600 new documents, but they were all duplicated ten times or more. So basically I got about 50 new emails that had never been produced in *Lewis* for some reason. But for everything else, they just said go look at *Lewis;* it's in there somewhere. And that production, as explained through our motion, is entirely deficient in ways that can be proven.

THE COURT: The *Lewis* production.

MR. BANKSTON: Exactly, right. And not only was it obviously not complying at the time it was given, deposition testimony in this case has revealed some more bad things about it, particularly the next

one.

Defendants can't account for tens of thousands of missing emails. They have no response to this in their motion. There is an affidavit up in *Lafferty* given around the same time as that other stuff saying that there's 80,000 emails with Sandy Hook in the title. In our case we didn't get as much discovery as *Lafferty* because it was broader. So we got somewhere in the neighborhood of 15,000 to 25,000 emails or total documents. Given the way they produced it, it's a little hard to give you a total number, but it's right around that neighborhood. *Lafferty* got about double. But there's about 80,000 emails that we know have Sandy Hook in the title. And we know they don't collate out the duplicates because Mr. Zimmerman testified in both cases they give out duplicates. Mr. Zimmerman testified there's 80,000 emails with Sandy Hook on them somewhere, and nobody knows what the story is. And there are these tens of thousands of missing emails now that have no explanation from anybody on the record.

Next one. They didn't issue a litigation hold. There's zero. That did not happen. And in fact, you would know if it did happen. If there was a written letter that has a litigation hold for Sandy Hook related materials, we'd have it because it would be

non-privileged and it would have the words Sandy Hook in it. That never got produced. In fact, what they testified happened was that around the time of the *Lewis* discovery they sent out an email to the company that said, hey, everybody, look for documents. They never did a litigation hold.

We talked about them preserving their email servers. And Mr. Zimmerman testified exactly like what we said. The first time a mirror image of the server was created was in January of 2019. Before that the server was periodically overriding itself, so it was periodic backups. So take, for instance -- let's say it does it once every month. There's emails on the server at the time this lawsuit started and for months and months afterward. But say an employee decides he wants to take those emails off and delete those emails. The moment that the server backs itself up the next time that email is lost forever. There was never any attempt to make a solid preservation of the documents that the defendants had in their possession. So none of the defendants' servers were imaged. There was no litigation hold sent throughout the entire company. This is grossly negligent behavior.

THE COURT: So you would argue under the *Brookshire* case a spoliation instruction that those

emails would be damaging to the defendants' defense.

MR. BANKSTON: Yes. And I would also argue by extension I would get a finding, and I'm not sure exactly how you'd want to word it, but that would accomplish the same thing for the purposes of this motion saying that had that discovery been produced it would have been favorable to the plaintiff for the purposes of this motion, this motion to dismiss.

Next one. The erasure of computers. This is interesting because --

THE COURT: And you agree we have to have an evidentiary hearing. Looking at *Brookshire*, a judge has to decide as a matter of fact whether it was intentional, whether they intentionally spoliated. That's what --

MR. BANKSTON: Yes.

THE COURT: That's what the majority opinion talks about. There are some exceptional circumstances for negligent destruction, but it has to be when it's out -- essentially outcome determinative information.

MR. BANKSTON: Exactly.

THE COURT: Otherwise, it has to be intentional destruction.

MR. BANKSTON: Right. And that's --

THE COURT: And you believe this record before me now proves intentional destruction of these emails; ergo, I should rule now that they get a spoliation instruction when this case is ultimately tried to a jury?

MR. BANKSTON: Yes, I believe that. And I think it's well beyond the emails. So I think the emails is actually maybe the smallest component of that. And I do think intentional as used in *Brookshire Brothers* is a bit of a term of art because it also encompasses a reckless disregard of such severity that you showed absolutely no care about trying to preserve anything. I think that can do it too. But I don't think you have to worry about that because there's plenty of intentional here.

First let's talk about the computers, all right? These were definitely erased. There's no question about that. What is being said now that was never said before is there exists apparently these portable hard drives, all right? There's apparently a set of portable hard drives that contain information that was at one time on these computers, maybe put on new computers.

We asked for all sources of information. We questioned the witnesses about exactly what was

searched. This is brand new. I can guarantee you there's no testimony about them searching portable hard drives or anything like that. This just seems to be an invention out of thin air.

And if you look at how they left the employees, if you can go to the next one -- oh, let's talk about Slack real quick too. Okay. So here's another thing where there was some obvious destruction going on here. First of all, you have people testifying that nobody at the company has access to Slack anymore. Slack was a messaging service used before RocketChat.

THE COURT: Slow that down. It was used before -- because the court reporter is hearing these terms for the first time. I've read them. Slack was the service used before --

MR. BANKSTON: RocketChat. When the testimony was made, it was -- the implication was given that Slack and RocketChat are successive to each other; in other words, the moment Slack ended they started using RocketChat. Apparently from the affidavits today there is a third instant messaging system that was never identified in interrogatories because there were specific questions about that, never testified about. And now there's this third messaging system that's still unidentified and we don't know anything about it,

whatever was in use between April 2016 and August 2018, right, which means that it was in use at the time the lawsuit was filed and for many months afterwards. And we have no information about what it is, and certainly nothing was ever done to search it.

More importantly, the Slack system, they now say in an affidavit that all the data to it is preserved. Well, if that's true, we have an email notification showing there were Sandy Hook Slack messages. Why don't we have those Slack messages, right?

There's nothing that they're saying about this that makes any sense. It does not add up. And it's our belief that they don't have anything in Slack that is going to be responsive to anything. They don't have the ability to search it. Zimmerman also told us they don't have the ability to search RocketChat. They said that they had to leave employees to do that for themselves. According to Zimmerman in testimony, that was the only thing that still existed. Now apparently there's an entire preservation of Slack somewhere that should contain responsive messages that wasn't searched and wasn't turned over and a whole new messaging system. And none of these were effectively managed or even cared about by counsel.

The next is where the defendants allowed individual employees to search their own files and devices. And here to allow the very people who are potentially implicated by the conduct to manage the discovery is clearly not sufficient. So there's just more on top of their total disregard for care.

Keep going. The social media accounts. This is interesting to me. Imagine you were an insurance company defending a case for something involving an auto accident and there was a vehicle that was in a storage facility that was set to be destroyed, or say you were paying to have a vehicle stored somewhere and you decided to stop paying your bill and the company gave you a warning that said, hey, if you don't pay your bill, if you don't follow our rules, we're going to destroy the car.

THE COURT: I should let you know you've now used 40 minutes.

MR. BANKSTON: Okay.

THE COURT: Go ahead.

MR. BANKSTON: They say we're going to destroy the car. If that defendant does nothing, they have intentionally spoliated that evidence, and that is exactly what happened here with social media accounts. And again, these accounts, when you talk about evidence

that underlies the claim, this is huge because this is how they communicate as an online media empire. And the argument that I hear is, well, maybe it's not lost. I mean, possibly these companies backed it up and they still have it a year now later; they still saved all of our data. No evidence of that and no attempts by defendants to even try to locate any of it. What we know is that those accounts were terminated and they do not exist anymore. That information is not available.

The last one. The videos. And this I just don't understand, Your Honor. We had unequivocal testimony, and you can see it from two different witnesses, from Jones and Dew, saying the videos are destroyed, not even God knows what all the videos are, we don't have them, YouTube destroyed them and we lost them. Now Michael Zimmerman is saying, no, everything we've ever uploaded to YouTube we actually have.

THE COURT: They say they backed up every one of the videos.

MR. BANKSTON: Every one. Well, if that's true, then all of my meet and confer letters when I said, hey, what about this video, this video, this video, and this video, where I have the specific titles and I know they have Sandy Hook in them, why don't I have those videos, right? There's something very

confusing about the video situation.

THE COURT: But you're suing over certain videos, aren't you?

MR. BANKSTON: I am.

THE COURT: Aren't you talking about the very same videos that you already know exist and in fact you've even seen?

MR. BANKSTON: Oh, and I know there's way more. My client has seen way more in the past.

THE COURT: I see. So you're looking for more and you might even augment your pleadings with --

MR. BANKSTON: Oh, absolutely.

THE COURT: -- additional videos for different dates falling within the statute of limitations and you believe they're out there.

MR. BANKSTON: Two things on that. One is that additional videos could also bolster the continuing course of conduct sort of thing. But yes, it's our -- from what we were able to tell from how InfoWars has been written about over these years and from my client's own memory, we know that this video list is not even close to complete. And therefore, the very evidence on which plaintiff is suing on the very conduct which we need to prove to a jury is gone and I don't have it. And that is very, very serious too.

Okay. So I'm going to talk to you a little bit about the law first, when we talked about considering, not testing, lesser sanctions. I'll move real quickly through this.

Go to the next slide. I'm sure you know the *Cummings* case. And about -- my point is that you don't actually have to test them. You just have to consider if they would be effective. And in this case, I don't think there's any reason to believe -- after *Heslin 1* where you gave a sanction and then on that very same day told them now you need to answer discovery in *Heslin 2*, it didn't affect their conduct, didn't have any ability to affect their conduct. So my argument would be there has to be something stronger than *Heslin 1*.

If you can go to another slide.

I want to talk about what *Cummings* was about because that case was a default, was entered when a party intentionally destroyed audiotapes that related to the claim. Basically in that situation it was recordings that they had made with the other party at some point, so it was extremely relevant to the case. And after being ordered to produce them, the plaintiff ended up destroying them. In that case they were defaulted. You have a similar situation here, but it's

actually much worse.

So first is you didn't have broad discovery obstruction in *Cummings*. You just had that one event. Here you have an entire tableau of them not taking this case seriously.

Go to the next one.

In *Cummings* you didn't have the destruction of the evidence upon which the claim was based, right? They didn't lose that. They still had what they were actually suing on. My client's been denied that.

The other problem is that in *Cummings* one of the things they talk about in what kind of sanctions you could consider, including whether you should default someone, is whether there's the availability of alternative evidence. And in this case, most of that alternative evidence has also been compromised through various forms of loss and failure to preserve, so we don't even have that.

And our last one. In *Cummings* there wasn't a prior pattern of discovery abuse by the same party in a string of related cases in front of that same Court, and that is something that this Court can consider.

Let me show you a couple of these cases.

This first one I want to show you is a San Antonio case. This is the one about the restraining orders. And I understand this is not a discovery sanction case. What it's talking about is a pattern of misconduct in prior cases. And so you had this -- you presented the trial court with several other cases where bad conduct -- sanctionable conduct happened. And the trial court said, based on what's happening, I need to make sure it's a substantial sanction so it doesn't happen again. And here I think you are faced with the same thing, that these defendants need some sort of sign to take this lawsuit seriously, and they don't have one yet, and that's what this Court needs to do.

Another one I wanted to point out to you, this is a Northern District of Texas case. And this was about you had a plaintiff who across the board just repeatedly failed to obey the Court rules and procedures in other cases, and so now they show up in another case and they still are not obeying the rules and procedures, and the Court says it's absolutely fine to consider their conduct in my prior cases when I'm trying to decide if they should have a dismissal. I believe you can do the same thing here.

These are what we can do, right? I think 215.2 probably gives you some creativity on top of this,

but any time you do that you're going out in uncharted territory, right? So I think and my opinion is we need to kind of stick to these types of remedies. And so you've tried some of them. Basically you've tried two and three on here. You've tried the expenses of discovery and the taxable court costs and you've made an order about designated facts being established, not for the purposes of the action like No. 3 says, but for the purposes of the motion.

So here I think I have somewhat of a sense of what's going on in this courtroom, that you may be quite rightly hesitant to consider a default. I understand that. I think there are a lot of other things in 215 that can actually have an effect in this case that can actually act as a deterrent and can maybe change this defendant's behavior. Because out of all of this, I think that's the most important. I don't think there's a lot you can really do to remedy me on the discovery side. I think if the goal of your action is to try to put me back in the place where I would be if I had gotten discovery, I don't think we can ever do that.

So what I think really has to -- the other two goals of this order under the case law was to punish the violator and to deter future conduct. And I don't know another way to say it, Judge, except that if a

defendant is allowed to come into this courtroom and make excuses after excuses and then is able to completely ignore discovery in the last case and that they know that they're really not going to face any -- look, they don't care if the motion's denied. They don't. They don't care. That's not part of the strategy. The strategy is not to win the motion. They don't care about that. The strategy is to delay. The strategy is to use this TCPA as a weapon to keep me as far away from a courtroom as possible.

THE COURT: Well, you have two depositions of Alex Jones, who is apparently the very heart of this entire operation.

MR. BANKSTON: And it wasn't -- I don't know if you've seen those transcripts.

THE COURT: And you wouldn't have had those if I hadn't ordered the discovery.

MR. BANKSTON: I agree.

THE COURT: And you got fairly extensive depositions.

MR. BANKSTON: I'm not sure if you've read those depositions or not, Your Honor, so I don't --

THE COURT: I've read portions.

MR. BANKSTON: Okay. And particularly in this last one, something that was very revealing -- and

you're right; he is the center of all this. He should know everything. He doesn't know anything.

THE COURT: Well, but isn't that incredibly helpful to you? I mean, when you play that to a fact-finder, "This, this is your answer for what is your basis for saying these things? This is your answer?" I mean --

MR. BANKSTON: I get what you're saying. I do. I understand what you're saying, that Jones -- but Jones has to make a choice here, and I think they've made the choice. They can either participate in discovery with good faith, and if they do, that's not going to be good for them.

THE COURT: Or you can hoist them on the petard he's created for himself, which is I can't tell you one thing I used as a source.

MR. BANKSTON: For them, that is way preferable to actually disclosing what the truth is.

THE COURT: Well, that's interesting.

MR. BANKSTON: Right? Because --

THE COURT: It doesn't seem like it looks good to me.

MR. BANKSTON: It's not good. They don't have a good choice. They have a Rosemary's -- or a Sophie's choice, right? They can either take the

sanction on the hit, pay the money at the end of the case, which they may or may not do because some -- there's a good idea that this probably ends up with Jones running from every judgment ever, but they can just delay everything to the end of the case, they can take the hit, which is to say now we're going to have these evidentiary findings against us, but nobody ever has to find out the deep dark truth of what happened here. That's what these defendants are doing right now. So they don't want me anywhere close to the truth of what happened here because what happened here was horrifying.

THE COURT: But a default doesn't get you any closer to that either. A default on liability means that liability is over, all we're going to move to now -- be careful what you ask for -- is how did this personally affect me as opposed to how was I affected by the death of my son to begin with.

MR. BANKSTON: Exactly.

THE COURT: And that's a limited offer of proof. You wouldn't go into all the liability facts, which seems to me, as a former plaintiff's lawyer myself, you might want to do. I don't know.

MR. BANKSTON: I think that's --

THE COURT: I'm not understanding how a

default gets you what you just said you want.

MR. BANKSTON: Ah, okay.

THE COURT: In fact, it kind of cuts it off.

MR. BANKSTON: You're right.

THE COURT: No more discovery of facts. We're done. Right?

MR. BANKSTON: Yes, absolutely.

THE COURT: Okay.

MR. BANKSTON: No, no, and I see what you -- I kind of see what your point is there of wouldn't I want to keep doing litigation to try to get facts or something like that.

THE COURT: I'm always wondering why trial lawyers are doing what they're doing. I can't help myself, having been one myself.

MR. BANKSTON: I have got no indication that any of the money I've spent and any of the time I've spent is getting me anywhere closer to that goal, nowhere closer to it. For two years I've been trying after that goal and I'm nowhere closer to it. I don't believe that these defendants will ever take this lawsuit seriously in any way, shape or form. And I do believe that instead of relying on whatever I just happen to have to have, whatever findings I can get out

of the court or whatever I have now in my petition, I don't want to roll the dice with a liability claim and then have my client wonder, would that jury have found liability if we had actually gotten the discovery? No, I'd just rather have the default. Again --

THE COURT: So you're thinking if he can't even put on any evidence about any sources, that you run the risk of a non-liability finding and then the client could be upset about that when you could have gotten a default from a discovery failure.

MR. BANKSTON: I think there are some other things in the discovery too that satisfy that too. I mean, we're kind of focusing in on this source issue, but, you know, I think they brought up this point of the *prima facie* elements could be met and they'd still have a way to prevail on the motion through like their affirmative defenses and all of that.

And as I think we talked about at the hearing last time, my discovery is relevant to a lot of those issues that that they're raising. You know, they have this constitutional argument that kind of hangs over the case that has a lot to do with what their motivations were and how they treated my client specifically and what their thinking was about my client specifically, not just about the malice issue. But they

seem to want to believe that they need -- that I would need to prove that Mr. Jones intended to cause my client harm, things like that.

There's a lot of different peripheral issues that are still addressed by discovery. And so I actually think in terms of how you handle the motion from an evidentiary standpoint, how you handled it in *Heslin 1* is logically correct, because instead of doing something like -- I mean, I don't want to bad mouth the Connecticut court, but instead of just striking the motion to dismiss, I think it's proper to make a finding that then affects your denial of it. And so I think that needs to happen here.

But what I'm really arguing with you today is that that's exactly what you gave for me last time, and there needs to be an escalation of how this Court responds to what is just egregious behavior by a party that knew that it was conducting this egregious behavior. We talked a little bit about Barnes because they knew who Barnes was and what he was doing. They had thrown him under the bus before. They stuck with him. And they stuck with him in this case.

And so here when we sanction, there's a sanction that flows from any of this, and there has to be -- there has to be mandatory attorneys' fees. You

can't let the client slip out from under that by saying, oh, it was this lawyer who's now lost to the wind to us. And you can't let the attorneys say, no, you can't get us either so nobody gets sanctioned, right? The client knew what they were doing. It was a very intentional act. And I think you can see from how that client was acting it was an intentional act.

So we have fees before you. I'm not going to go into those because I have the anticipation I'm about to be put on the witness stand to talk about them, so I'm not going to talk to you much about that.

THE COURT: Also, you're running out of time.

MR. BANKSTON: I should be running out of time, exactly. And, of course, on the merits, I think you don't need to hear anything from me. So with that, let's go ahead and get to the evidence and we'll finish up.

THE COURT: Okay. Let me log your time here. Back to you for any more argument or we can go straight to evidence.

MR. JEFFERIES: Sure. I'd like to briefly before I go to evidence respond to some of that in their argument.

THE COURT: All right.

MR. JEFFERIES: Again, Judge, I just want to reiterate again this is the first motion for sanctions in this case. The two cases he put up there are totally inapplicable to Rule 215, *Transamerica*, et cetera.

As far as spoliation, I don't think they met their burden in their evidence attached to their motion that spoliation occurred. Again, we talked about the misleading representation, and I read to you out loud Mr. Zimmerman's deposition testimony. There is no evidence that those emails -- any email has been lost. There is no evidence that any video has been lost. There is no evidence that, you know, any information on Facebook or Twitter isn't available -- they're the ones who host the site -- that isn't available through a subpoena to them.

And again, I want to focus the judge on -- and the judge made a very good point earlier. You know, we're here today in connection with the TCPA dismissal claim. The judge granted in my opinion pretty broad discovery to them.

THE COURT: Meaning me?

MR. JEFFERIES: Yes. Yes, I mean, they got to take Alex -- Mr. Jones' deposition. They got to take Mr. Zimmerman's deposition. They got a certain

amount of documents. Again, I'm not defending what happened with Mr. Dew, the corporate rep, but they got Mr. Jones' deposition. They don't like the answers primarily, but, you know, that's part of a deposition.

That being said, as far as their concern or their request that because Mr. Dew was not prepared to talk about sources, that they should get some order precluding the defendants from putting on evidence in the future regarding sources I think would be wholly inappropriate for a couple of reasons. One is there's no, again, evidence that's going anywhere.

There's nothing to preclude, meaning again -- you know, there's a new quarterback now. Barnes is gone. They've complained about Barnes all throughout their motion, in their presentation, et cetera. He's gone, okay? He is off the case. I know already I cannot tell you -- yeah, all cases, I mean, any representation. He was never general counsel. He had a retention agreement. Yes, he was represented as general counsel. Mr. Jones -- you know, that's a generic term. But he had a retention agreement. He was never an employee of either FSS or InfoWars. So, you know, how he was referred to, he was an attorney. He's been dismissed from all facets of any representation of Mr. Jones, you know, as of the night

before the depositions, okay?

I can assure this Court I've spent significant time finding out what's available, what if anything is no longer available, hence Mr. Zimmerman's affidavit. And I will represent to this Court that, you know, regardless if this goes on appeal, that doesn't preclude me from -- it precludes -- it stays the Court as far as filing motions, et cetera. It certainly doesn't preclude me from providing additional videos, documents, and information they're seeking during that period of time, and I fully intend to do so. I've already started that process. So again, they're asking now for basically an instruction that, you know --

THE COURT: So what you're saying is you're going to continue to comply with the order --

MR. JEFFERIES: I --

THE COURT: -- excuse me -- that includes written discovery, which is the exhibit to my order, ordering you to produce those things.

MR. JEFFERIES: Absolutely, Judge. I'm representing to the Court that I have spent countless hours understanding infrastructure, what exists, et cetera, et cetera, and I am certainly going to comply with that 100 percent, stay or no stay, moving forward, absolutely.

THE COURT: So your point is let it come back to the trial judge who's going to try the case and see just how quickly you do that --

MR. JEFFERIES: Exactly.

THE COURT: -- and how compliant you are with the order before we make potentially outcome determinative decisions --

MR. JEFFERIES: Exactly right.

THE COURT: -- or preclude evidence from being offered, et cetera.

MR. JEFFERIES: Exactly right. Exactly right.

THE COURT: All right.

MR. JEFFERIES: And again, I do want to reiterate one last time that the video that was shown, et cetera, et cetera, these are in other cases.

So that's all the argument I have. I'll call myself as the first witness.

THE COURT: Let me make sure they don't have any more argument. They've already used 53 minutes. I would think they wouldn't.

You don't want to burn more time, do you?

MR. BANKSTON: I wasn't aware that I even had the option. I do not plan on it.

THE COURT: I was just going to go back

and forth until you're ready for witnesses. All right. You may call your first witness.

MR. JEFFERIES: It will be myself, and Mr. Burnett will ask questions.

THE COURT: Please step forward in front of me and raise your right hand. Oh, yeah, maybe we should take a break. Hang on just one second. Let me log your time. We'll take a break now for 10 or 15 minutes. I'll see you back then.

(Recess taken)

THE COURT: You may call your first witness.

MR. JEFFERIES: I call myself, Your Honor.

THE COURT: All right. Please step forward in front of me and raise your right hand.

(The witness was sworn)

WADE JEFFERIES,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BURNETT:

Q. Good afternoon. Will you tell us your name for the record.

A. Wade Jefferies.

Q. Are you a licensed lawyer in the state of Texas?

A. I am.

Q. Are you the lead counsel for the defendants in this case?

A. I am now.

Q. And when did you become lead counsel for the defendants?

A. November 26th, the night before the depositions in this -- the case we're here for today.

Q. And the depositions you're referring to are the ones that Judge Jenkins ordered in October, correct?

A. That's correct.

Q. Okay. And when you became involved in this case as lead counsel for the defendants, what did -- who do you understand was in charge of responding to the discovery request as ordered by Judge Jenkins?

A. Robert Barnes.

Q. And was he doing so as sort of outside general counsel for the defendants?

A. Yes, he was -- correct, outside is fair.

Q. Was it your understanding that I, Michael Burnett, had no involvement, participation, or responsibility for responding to that discovery as ordered by Judge Jenkins?

A. That's correct.

Q. And then did you represent the defendants at

the depositions?

A. I did. I defended their depositions.

Q. And did it become clear to you during the corporate representative's deposition that the corporate representative that was identified by Mr. Barnes to appear on behalf of the corporation was unable to answer all of the questions along the topics as ordered by Judge Jenkins?

A. Yes. I did two things the night before. One, I realized that Mr. Dew, who was chosen by Mr. Barnes to be the corporate rep on all issues, that he couldn't testify at all regarding IT issues. So I immediately called Mr. Bankston and said we're going to have two corporate reps as opposed to one. But then during the deposition the following day I realized Mr. Dew was unable to answer the questions posed to him.

Q. Okay. And what efforts, if any, did you make after that deposition to cure this situation and hopefully avoid a hearing like we're in today?

A. Sure. I reached out to plaintiff's counsel, Mr. Bankston. I told him that, you know, I understood that Mr. Dew was unable to answer the questions posed, offered to bring a new corporate rep to Houston so he could take that deposition again and to pay for, you know, the delta in additional cost as a result of

having to retake that deposition.

Q. And you made that offer to Mr. Bankston?

A. Absolutely.

Q. Okay. And what was Mr. Bankston's response to that offer?

A. He declined.

Q. All right. Do you know why he declined? Or excuse me. Did he tell you why he was declining your offer?

A. He stated that it wasn't about money; it was about time.

MR. BANKSTON: Pass the witness.

THE COURT: Use your microphone if you're going to ask any questions.

MR. OGDEN: I have questions, Your Honor.

CROSS-EXAMINATION

BY MR. OGDEN:

Q. Mr. Jefferies, you testified a second ago that on November 26 was when you became lead counsel and your understanding was Robert Barnes was lead counsel prior to you, correct?

A. Correct.

Q. So as general counsel for InfoWars, Robert Barnes was actually in the process of litigating the case as well?

A. He was -- I wouldn't say he was responsible for litigating the case. He was responsible for interfacing with the clients, getting the interrogatory responses from the clients, interfacing with the clients in obtaining the documents that were ultimately produced to you and Mr. Bankston.

Q. Who was in charge of litigating the case prior to you? Excuse me. Immediately prior to you.

A. Immediately prior to me? In this case, I don't know.

Q. Are you familiar with the motion to substitute counsel that was filed that introduced you into the case somewhere in September of 2019?

A. No, there's never been a motion to substitute on my behalf. I filed notices of appearances in all four of the Austin cases.

Q. Okay. Are there any motions to withdraw as counsel filed on behalf of the defendants you represent currently?

A. Not in this case, no. I believe in the *Scarlett Lewis* case that Mark Enoch has a pending motion to withdraw.

Q. Earlier you said outside general counsel, correct?

A. Correct.

Q. What is that?

A. Outside general counsel as I would define it would mean it's somebody generally representing a client on various matters. However, he or she is not employed by the entity he is acting -- he or she is acting as outside general counsel for.

Q. So from the time that you filed an appearance in this case to sitting here today, you aren't sure who was litigating this case prior to you; is that your testimony?

A. No, it's not my testimony. As far as what Austin attorney prior to November 26? Is that your question?

Q. It can be Austin. It can -- I'm just trying to figure out which attorney was in charge of litigating this case.

A. I guess I'm struggling with your term litigating. Prior to November 26, I filed my notice of appearance I believe on November the 7th, maybe November the 6th. And Michael Burnett is also an attorney of record in this case.

Q. Are there any other attorneys of record in this case besides Mr. Burnett and yourself?

A. Not to my knowledge.

Q. Have there ever been to your knowledge?

A. Not to my knowledge in this case.

Q. So it will be -- and Mr. Burnett was lead counsel -- was counsel of record in this case prior to you joining, correct?

A. That's correct.

Q. So would it be your understanding that Mr. Burnett was lead counsel in this case prior to November 26, 2019?

A. It would be my understanding that Mr. Burnett was Austin litigation counsel for this case, that's correct.

Q. What's the difference between Austin litigation counsel and lead counsel?

A. Sure. The distinction in my mind is imagine -- the distinction in my mind is Mr. Barnes in his capacity as outside general counsel was directing, you know, discovery efforts, et cetera, et cetera, as opposed to Mr. Burnett. Mr. Burnett's responsibility would have been showing up, as he is today, arguing at various hearings.

Q. You would agree with me that when an attorney files something with his name at the bottom, he's responsible for that filing, correct?

A. I'd agree with that.

Q. Do you know whose name is on the discovery

responses in this case?

A. My name is on several of them.

Q. Do you know who else's name is on them?

A. I don't believe there was any discovery. I think it's only my name.

Q. My last question is -- or the last area, depending on your answer to the last question.

A. Sure, fair enough.

Q. You didn't prep Mr. Dew on any of the other topics other than IT and learned for the first time during his deposition that he was not prepared on any of the other corporate topics?

A. Let me -- I think that's -- let me try to answer that question. I learned the night before the depositions that Mr. Dew was not prepared to answer anything regarding IT. I also learned the night before that he had -- was not as prepared as I had hoped he would be regarding the other matters.

Q. And from the time you filed your notice of appearance in early November to the time Mr. Dew was deposed, did you spend all of that time trying to read the file and catch up with what was going on?

A. Oh, I spent the majority of time reviewing all four case files, obviously catching up on two years' worth of documents, et cetera, et cetera. That's where

I spent the majority of my time.

MR. OGDEN: That's all I have.

MR. BURNETT: No questions.

THE COURT: All right. You may step down.

MR. JEFFERIES: Thank you, Judge.

THE COURT: You may call your next witness.

MR. JEFFERIES: Michael Burnett.

THE COURT: Step forward in front of me and raise your right hand.

(The witness was sworn)

MR. JEFFERIES: Your Honor, may I approach to have two exhibits marked?

THE COURT: Yes, you can approach the court reporter to mark exhibits.

(The witness was sworn)

MICHAEL BURNETT,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JEFFERIES:

Q. Can you state your name for the record?

A. Michael Burnett.

Q. And Michael Burnett, are you an attorney?

A. Yes, I am.

Q. And how long have you been practicing?

A. I've been practicing in Austin for -- I guess I've been licensed for 25 years. I worked for a federal judge for a year, and then for the last 24 years I've been here in Austin.

Q. Okay. Are you familiar with the rates charged by other attorneys here in Travis County --

A. Yes, I am.

Q. -- for cases --

THE COURT: Excuse me. Wait until he gets his entire question out. The court reporter can't record it otherwise.

THE REPORTER: I didn't get the last few words.

THE COURT: She didn't get it.

MR. JEFFERIES: Sure.

Q. (BY MR. JEFFERIES) Are you familiar with the rates customarily charged by attorneys here in Travis County for cases such as this?

A. Yes, I am. I am primarily a family lawyer now, board certified in family law, and my practice is -- if it's not 100 percent, 99 percent in the family law area. But prior to that, for at least 15 years I practiced extensively in commercial litigation, and I still occasionally will have a commercial litigation case that I'll handle. So yes, I'm familiar with the rates in the

commercial litigation area as well as the family law area.

Q. Okay. And can you identify what's been marked as Exhibit 1?

A. Yes. Exhibit No. 1 is the declaration of Mark Bankston that he's offered to support his attorneys' fees claim in this case.

Q. Okay. And that's a true and correct copy?

A. Yes, it is.

MR. JEFFERIES: I move that Exhibit 1 be admitted, Judge.

MR. BANKSTON: No objection, Your Honor.

THE COURT: Thank you, Counsel. Defendants' 1 is admitted.

(Defendants' Exhibit 1 admitted)

Q. (BY MR. JEFFERIES) Have you had a chance to look over Exhibit No. 1?

A. I have.

Q. Okay. And what conclusions -- well, have you had a chance to run any calculations or analysis of Exhibit No. 1?

A. I have.

Q. Okay. And as a result of that analysis, what conclusions, if any, did you reach?

A. A few conclusions that I have. And let me

preface my comments that with the exception that I don't like the way plaintiff's counsel is litigating this case in the press, I have no questions about their integrity, their professionalism. We've gotten along well. I don't want any of my testimony to be construed as damaging or impugning their character or the work that they're doing in this case because I do think they are fine lawyers. However, they are from Houston, and I first and foremost believe that the rates that they are charging are not reasonable rates for the Austin market. I have done litigation in Houston myself, and I know the rates in Houston are higher than the Austin market.

But here Mr. Bankston has been licensed to practice law for ten years. He's claiming a rate of $450 per hour. And in the Austin market, for someone with his level of experience and being a very fine lawyer, I think a reasonable rate for his level of experience would be $350 an hour, not $450 an hour.

Similarly for Mr. Ogden, who's also a fine lawyer, he's been practicing law for six years. It appears that he's been practicing longer -- I'll give him credit for that -- by the job he's doing in this case. But the rate that he's claiming here is $400 an hour, and a reasonable rate for someone even as good as he is in Austin as a six-year lawyer would be around

$275 per hour.

Q. Okay. In addition to your analysis and opinions on their rates and whether they're reasonable or not for the Austin market, have you had a chance to look at the time entries -- the time charged for various services provided or documents drafted?

A. Yes, I have. If you look at Exhibit No. 1, there's no breakdown by day, by specific date, what was done, but there's a general description. And it goes through from the beginning of drafting the written discovery request that is the subject of the motion, drafting the motion to compel that the Court granted -- or the motion for discovery that the Court granted, and then actually then reviewing the discovery and taking the discovery and drafting today's -- the motion that's the subject of today's hearing. They're down in those different categories. If you take the claimed amount of time that they did to draft the written discovery request, he's claiming 3.5 hours. If you look at written discovery request, I don't think it would be more than an hour and a half to draft that discovery.

Q. Okay. Let me stop you right there. Look at Exhibit No. 2.

A. Yes.

Q. And can you identify what's been marked as

Exhibit No. 2?

A. Yes. Exhibit No. 2 are the written discovery requests that Judge Jenkins ordered that the defendants answered.

Q. Okay. And how many -- for Free Speech Systems, how many discovery requests were sent to Free Speech Systems?

A. Well, if you look at them, there's one request for admission, four interrogatories, and three requests for documents.

Q. Okay. And do you know if Mr. Bankston drafted discovery requests for Free Speech Systems in the *Scarlett Lewis* matter?

A. Yes.

Q. So all in all, looking at the discovery contained in Exhibit No. 2, how long do you think it should have taken to draft these particular motions -- or these discovery requests? Excuse me.

A. In many law firms this discovery would have been drafted by a paralegal or an associate, not the lead counsel for the client. But regardless of who was doing it, especially someone of Mr. Bankston's level and experience and skill, an hour and a half at the most.

Q. Okay. Let me draw your attention down to the drafting of the motion for sanctions for discovery

abuse.

A. Yes.

Q. It says 36 hours, correct?

A. Right.

Q. And it's got a date range from November 27th, '19 through 12-10-19, correct?

A. Right.

Q. So it's nowhere broken down by how much hours spent per day or anything like that, correct?

A. No. No. It is bold billing -- or actually, I think we refer to that as block billing. He claims that he spent 36 hours drafting the motion for sanctions and that Mr. Ogden says that he worked on it for 18 hours. That's a total of 54 hours to draft a 47-page motion that included a lot of quotes from other cases and discovery in there. And if you break it down per page, that means they would have spent almost 69 minutes, over an hour, drafting each page of that motion, which in my opinion is excessive and not reasonable.

Q. Okay. And going back to -- you said citations. You reviewed their motion for sanctions, true?

A. Yes.

Q. Okay. And would you agree that a large portion of their 46-page -- not the exhibits but the actual motion for sanctions is copy and pasted deposition

testimony for depositions in this case?

A. Yeah. Well, in this case and then also information that they've had in other cases that I believe would have been reviewed before the drafting of this motion because it's been referred to by plaintiff's counsel in other contexts.

Q. And when you've got a 46-page motion that includes a lot of those cut and paste kind of jobs, as I call them, in your experience and expertise typically does it take less to draft such a motion as opposed to, you know, a court appellate brief or a motion for summary judgment brief?

A. Of course.

Q. Okay.

A. And then --

Q. Go ahead.

A. Did you want to ask me about some of the other entries?

Q. Oh, yeah. Let me ask you a couple other questions. One, let me point to deposition preparation for Alex Jones, 20 hours. Do you see that?

A. Right. I don't think it's reasonable to spend 20 hours preparing to take a three-hour deposition when counsel's already taken the deposition of Mr. Jones before. He obviously was prepared about the facts of

the case because we had a previous hearing on a motion to dismiss where he went into a lot of the allegations. I don't believe it should have taken him more than five hours to prepare to depose Mr. Jones.

Q. And do you have an opinion on whether or not that deposition preparation is going to --

THE COURT: I'm sorry. What did you say instead of the 36 hours for drafting the motion? Did you ever answer a question about how long you think it should have taken?

THE WITNESS: Five hours, Your Honor.

THE COURT: Instead of 36 hours.

THE WITNESS: Yes, Your Honor.

Q. (BY MR. JEFFERIES) Well, and for clarification, it was 36 by Mr. Bankston and 18 hours by Mr. Ogden, correct?

A. That's correct.

Q. Okay. So that's a total of 54 hours they charged, correct?

A. That's correct.

Q. Okay. Now, going back to the preparation for the deposition, do you have an opinion whether or not that preparation is going to carry over once we start getting into discovery in the case-in-chief?

A. Yes, I do. I think all that information -- I

mean, or time that he spent preparing for Mr. Jones' deposition and also the time he spent preparing for Mr. Watson's deposition can be used in the case-in-chief, I'll call it.

When you look at the deposition preparation for Paul Watson, Mr. Bankston avers that he spent 14 hours preparing for that deposition. I don't think it should have taken him more than five hours to prepare for that deposition.

Mr. Bankston also says that he spent 18 hours reviewing documents. Similar to the deposition prep, that's not wasted time on the discovery -- or, you know, that's not lost time for the corporate rep not being able to testify about all the matters because those documents would have had to have been reviewed as part of the case-in-chief anyway, so that information can be used --

Q. Okay. Going back --

A. -- you know, after the hearing.

THE COURT: Excuse me. He didn't finish his answer and now you're speaking.

MR. JEFFERIES: I apologize, Judge.

THE COURT: The court reporter just can't do that. Do you want to finish your answer?

THE WITNESS: Yeah.

A. That time that Mr. Bankston and Mr. Ogden both spent preparing for these depositions can be used in the case-in-chief and also the time they spent reviewing the documents. I do believe that, you know -- I've gone through and calculated if you want me to answer what I do think would be an appropriate amount of time that they have spent that could be argued by counsel as being wasted because they were unable to get all of the discovery ordered by Judge Jenkins.

Q. (BY MR. JEFFERIES) And what is that amount?

A. Well, I would say -- if you look at the time that they have on Exhibit No. 1, preparing -- for Mr. Bankston's time, five hours to prepare for Mr. Jones' deposition would be a reasonable amount of time. Five hours for preparing for Mr. Watson's deposition. I think he should get the full credit for the four hours he actually took Mr. Jones' deposition, the two hours to take the deposition of Mr. Watson, and then five hours for drafting the motion. That would be 21 hours that I think can be argued was, quote, unquote, wasted on that discovery that he didn't obtain that was ordered by Judge Jenkins.

And then if you look at Mr. Ogden's time, I think five hours preparing for the deposition of Free Speech Systems, LLC and four hours to actually take that

deposition for a total of nine hours it could be argued as wasted on the discovery that they weren't able to get.

If you add those hours together, if you just -- you know, if the Court orders that the rates claimed by or charged by plaintiff's counsel is a reasonable rate for Austin, using those rates then the total amount of fees would be $13,050. If the Court were going to go with the lower rates that I testified that I think are reasonable for the Austin market, then the fees would be $9,825.

MR. JEFFERIES: I'll pass the witness.

MR. OGDEN: Cross, Your Honor.

THE COURT: Use your microphone, please.

MR. OGDEN: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. OGDEN:

Q. Mr. Burnett, earlier you said -- or you used the term the Austin market, correct?

A. Yes.

Q. What did you do to prepare for your testimony today to determine reasonable rates for the Austin market?

A. Well, one, I'm familiar with the rates because I practice here in Austin and so I have personal

knowledge what the rates are. In addition, prior to my testimony today, I called Mark Hawkins, who's a licensed lawyer here in town who does commercial litigation. He's been practicing law in Austin since I think 1995. He's a partner at Armbrust & Brown. I've got a lot of respect for him. He's got a great reputation. In addition to being a commercial litigator himself, Mr. Hawkins is a mediator for commercial litigation cases. And in his role as a mediator, he encounters a lot of other lawyers and is familiar with the rates charged by other lawyers doing commercial litigation. And I asked him what he thought was a reasonable rate, and the answers he gave me coincidentally were the same rates that I had come up with on my own and that I testified to earlier today.

THE COURT: I should let the plaintiffs now know you've crossed the hour point. You're down to under 20 minutes for everything you're going to say and every question you're going to ask.

MR. OGDEN: Yes, Your Honor.

Q. (BY MR. OGDEN) During your questioning, you mentioned your experience and said -- you listed a lot of areas that you practice, family law and commercial litigation. You did not mention that you practiced any personal injury, correct?

A. No, I'm not a personal injury lawyer. I have handled defamation cases for the plaintiff and the defendant, but in my mind personal injury like car wrecks, medical malpractice, those kind of cases, I've never handled those in my practice.

Q. What do you charge by the hour?

A. I charge $575 an hour.

Q. How many defamation cases have you done?

A. Three that I can think of right now, including one trial I had against 60 Minutes in El Paso.

Q. How much do you believe is a reasonable rate for Mr. Bankston to charge for this case?

A. $350 per hour.

Q. How did you get to that number?

A. Based on his years of practicing law, someone at the top level of that. I think that's what the market here in Austin is, based on my experience and conversations with Mr. Hawkins.

Q. So the accepted principles and methods that you used to apply to the facts of this case to come to your expert opinion are based solely on an attorney's experience and numbers of years, correct?

A. No. No. No, it's not based solely on the number of years. In Austin if you're -- he's a very accomplished and talented lawyer, but he's a ten-year

lawyer. I don't believe he's board certified. And ten-year lawyers -- I don't know what you guys do down there. In Austin they don't charge $450 per hour, and that's based on my own personal experience in dealing with other lawyers and also my conversation with Mr. Hawkins. It doesn't mean he's a bad lawyer or he's not doing a good job. I'm just saying someone at that level, you have to be in your -- for most people in the 20 years of practice to be able to charge a rate that high.

Q. What about $400 an hour? How long do you need to practice to charge $400 an hour?

A. I think around probably in Austin in this kind of case closer to 15 years.

Q. Are you aware that Mr. Enoch who represents your clients charged his son, who has less experience than I do, $400 an hour and sought over $130,000 against my client for a TCPA motion in *Heslin 1*? Did you know that?

A. No, I didn't know that. But Mr. Enoch is a Dallas lawyer where the rates are higher up in Dallas than they are in Austin. And I'm also familiar with the case law, and I assume you are as well, that the reasonableness of your rates have nothing to do with the rate or hours that the opposing side charges. That's

not the standard. So that's my answer on that.

Q. Are you aware that Mr. -- is it your understanding Mr. Bankston only practices in Houston?

A. No, I never said that.

Q. Are you aware that Mr. Bankston practices in Austin?

A. I don't know one way or the other, but that doesn't change my testimony on what his rate should be. I mean, the fact of whether --

THE COURT: Just answer the question and wait for the next question.

THE WITNESS: Right.

Q. (BY MR. OGDEN) Your answer is no, you don't know where Mr. Bankston practices?

A. No. I just know he has these four cases in Austin, but I don't know the extent of his docket.

Q. Are you aware that Mr. -- did you do anything to prepare yourself to learn Mr. Bankston's experience over the last ten years?

A. Yes. I looked at his website, and I looked him up on the state bar website to find out when he was licensed to practice law, and I tried to find out whether or not he was board certified in any practice area.

Q. Are you aware that Mr. Bankston is undefeated

at three state supreme courts outside of Texas and currently has a brief pending in front of the United States Supreme Court all involving complex products liability cases?

A. No. That doesn't make a difference to me, no.

Q. So it doesn't matter to you what a lawyer does once he's licensed; you just count the years?

A. No, no. No, it does matter what he did. I gave him the benefit of the doubt of being a very excellent lawyer in coming up with the rate. I think he at 350 an hour for a ten-year lawyer in Austin is on the very high end. There's a lot of lawyers that have been practicing ten years that I would say based on their experience and level of competency should be around 200 or 225 per hour. I do think he's a fine lawyer. And that's great to hear he's undefeated, but...

Q. You understand that you're -- that you've been called as an expert in this case as you sit here, correct?

A. Yes.

Q. Do you believe you adequately prepared yourself to give expert testimony within a reasonable degree of professional certainty as to Mr. Bankston's experience?

A. Yes, and also for your experience as well, I do.

Q. You said that the 36 hours Mr. Bankston spent on the briefing shouldn't have been more than five hours, correct?

A. That's my opinion, yes.

Q. How many documents were attached to the motion?

A. Many, many pages.

Q. You don't know?

A. No, no, I didn't count the pages, but I know -- I think it's a 600-something-page document, and many of the pages are transcripts that are attached that Mr. Bankston has been referencing in other cases, and he's also been sending this information -- many of this -- much of this information to the press. And so I don't think it's reasonable to attribute all the time that he's done looking at this information and gathering it for this motion to be reasonable. I don't.

Q. There are three new depositions that were involved in this motion, correct?

A. The three new depositions?

Q. Yes.

A. Yeah, those are the corporate represent -- the corporate representative depositions and Mr. Jones' depositions that Mr. Bankston attended.

Q. How many pages were there?

A. I didn't count the pages.

Q. Did you read them?

A. The depositions?

Q. Yes.

A. No. I wasn't there and I have not read the transcripts.

Q. So you don't know how many pages were involved in the motion, attached to the motion as attachments -- you don't know how many pages each deposition was that was cited in the motion, yet you're giving an opinion to a reasonable degree of professional certainty on how many hours it should have taken to draft the motion, correct?

A. That is correct. He was at the deposition --

MR. BURNETT: That's all I have, Your Honor.

MR. JEFFERIES: No further questions, Your Honor. Pass the witness.

THE COURT: You may step down.

MR. JEFFERIES: I have no further witnesses, Judge.

THE COURT: Oh, I thought you were calling another one.

Okay. The hearing turns to you to call any witnesses you wish to call. Any witnesses you wish to call?

MR. BANKSTON: Excuse me, Your Honor. No, we -- no need to call any witnesses.

THE COURT: Okay. You have an unequal consumption of time. How much time do you want to -- you made extensive arguments at the beginning. I'm sure you don't want to make those arguments again. How long do you wish to argue now?

MR. JEFFERIES: I mean, Your Honor, I just need a short closing statement.

THE COURT: Do you want them to close first and then you --

MR. JEFFERIES: Yes.

THE COURT: -- so that you can have the last word?

MR. JEFFERIES: Yes, Your Honor.

THE COURT: Can we simply say ten minutes a side for a final closing argument?

MR. JEFFERIES: Certainly.

THE COURT: Or do you need -- is that ample?

MR. BANKSTON: That's ample for me, Your Honor.

MR. JEFFERIES: Likewise, Judge.

THE COURT: Great. Then you get to go first because I said they would get the last word since

they have the burden of persuasion.

MR. BANKSTON: Your Honor, if it please the Court, I don't think I need to talk about obviously the merits of the motion to dismiss or even really the sanctions motion. I think you've heard quite a bit about it and the papers are really exhaustive. I just wanted to spend a little time here at the end addressing my fees and Mr. Ogden's fees and some of the testimony that was given about that.

First of all, as you can tell from my affidavit, I am an unusually accomplished lawyer for my age. I understand that. I have reduced what my standard billing is. I bill at the same level Mr. Burnett bills at. I submit those bills in consolidated litigation. I've been paid in many, many cases at the rate of $550 an hour. You know, I've talked about some of those experiences.

Mr. Ogden likewise is sort of a rising star here in Texas and is at the center of some of the most complicated mass torts in south Texas, and he bills at a high rate too.

We've both reduced our fees for this case, and I've tried to explain why that is. And it is a lower rate than Mr. Burnett. It's a lower rate than Mr. Enoch's 535. And so we've brought that rate down,

and I do believe it's appropriate. I belong to a law firm that is very accomplished and is one of the -- is in the running for the top three products liability firms in the country this year. We do fantastic work. And I take any umbrage at the idea that the billing that I testified to is not worth for what it is in this case. This case is a very unusual case. It is a case that has incredible national focus on it. And I think it's right for these clients to have hired a lawyer of my type.

In terms of the time on some of these, you heard a little bit of Mr. Ogden talking about Mr. Burnett making these opinions without knowing the actual specifics of how much some of this should have taken. And I want to point to an example of that. For instance, take the interrogatories, for example. I had to draft discovery in this case. And Mr. Burnett says, no, there's no way it should have taken you long to draft that discovery.

THE COURT: Is that the category drafting proposed written discovery?

MR. BANKSTON: That's correct, Your Honor. Okay. And Mr. Burnett says, oh, you should have only taken about an hour, an hour and a half to do that. And if you look at that discovery, let's just take one of the interrogatories, which is one of the interrogatories

to Mr. Jones. And that interrogatory has 18 separate subparts that reference 18 specific contentions that were advanced in 18 separate videos, all right? The amount of time it took to organize those videos, pull the quotes, arrange all of that into that one interrogatory took me an hour and a half, much less the entire remainder of the discovery.

This case is incredibly detailed oriented, and it has an ever exponentially growing record as I keep discovery more in the public domain. It has taken an immense amount of time.

None of the testimony that was given to you about the fees was really done to a reasonable degree of certainty. It was just sort of another lawyer's opinion. And in case after case after case that I've been involved in which I'm doing high-level briefing -- and in this case, this motion for sanctions is a highly technical motion and, as you saw, with nearly 30 exhibits that had to be all coordinated and done. I typically average about an hour a page to get a motion like that done. And that's what's happened on this case and it's happened in all of what you see in front of you.

The hours that we have claimed are substantially less than what defendants have routinely

claimed over and over in this case. And there is some element of fairness to be considered there. But what I really want --

THE COURT: What you're saying is to draft this motion was a total of 46 hours of attorney time; is that right?

MR. BANKSTON: Yes, Your Honor.

THE COURT: No, I'm sorry. 54 hours of attorney time.

MR. BANKSTON: Yes, 54 hours of attorney time to draft the 50-page motion and do the exhibits and have it all done. Basically me and Mr. Ogden took sections of that. He took a smaller portion of the motion than I did and we worked on it side by side.

I also want to point out that we have been and always are conscientious of this Court to be conservative in our fees. Not everything that we have done in this case quite clearly is charged on those. One of the things that we have done, for instance, just because -- I think maybe we're entitled to it, but I haven't done it. You aren't going to see charges up there for me and Mr. Ogden's travel. You're not going to see us for the time that we literally have to spend here away from other work. None of that is in there. We've tried -- both Mr. Ogden and I showed up to all

three depositions. We're only charging one lawyer.

THE COURT: How are you getting here, now that I'm curious?

MR. BANKSTON: Actually, I've actually discovered a service called Vonlane, which is a bus service that comes up here.

THE COURT: Yes, I've heard about it.

MR. BANKSTON: And it's really great for attorneys because they'll set you up a desk too while you're working. Maybe that's another reason I don't need to claim the time that I'm on the bus, because I can actually make something of it, but I am conscientious about those things.

This attorneys' fees is consistent with every other affidavit we've ever submitted in the case. If you go back and you look at our expedited discovery or any of the other affidavits that I've submitted, you're going to see the amounts of times to do these tasks is directly on target.

THE COURT: Well, since you bring that up, have you compared this to your affidavit that you submitted for your 91a claim for fees?

MR. BANKSTON: Yes. For the work that was done in *Heslin 1*, correct, Your Honor. Yes, I've taken a look at that.

THE COURT: Well, the 91a is -- there's the 91a motion to dismiss in *Heslin 2*. Do you remember? We had a hearing --

MR. BANKSTON: Oh, yes. Yes. I'm sorry, Your Honor. Yes.

THE COURT: Have you looked at that affidavit to compare it to the affidavit that you submitted for the motion for sanctions?

MR. BANKSTON: I have done that at one point, not recently enough to talk to you about it in great detail without me pulling it up.

THE COURT: You would agree, though, you were telling me I really have to award all the fees in the 91a motion if I deny it.

MR. BANKSTON: Right. That was my argument, yes.

THE COURT: Yes. And there are several entries on that affidavit that match up the entries on this affidavit. I should not order them twice, right?

MR. BANKSTON: Oh, I agree with that, yes.

THE COURT: And I found -- and I'm sorry to tell you this -- but some disconcerting inconsistencies on three entries on the affidavit. I did look at them. For example, on the 91a affidavit, it says -- let's see. Drafting proposed discovery, two

hours. But on this affidavit it's drafting proposed written discovery, three and a half hours. Of course, if I had already awarded drafting discovery in the 91a motion, I shouldn't award it here, but it's a different number of hours. And then drafting the motion for expedited discovery in the 91a motion, six hours. In this motion today, nine hours. And then finally, consultation with expert regarding discovery. And I will say you put three different dates, 9-5 to 9-8, on this new affidavit, but on the affidavit you submitted in October all of your -- and you said this was all the work you've done on the case and I should award all of it.

MR. BANKSTON: Right.

THE COURT: That was the argument. I remember.

MR. BANKSTON: Okay.

THE COURT: Not just discovery, but all of it. Consultation with discovery -- with expert for discovery was two hours, but now on this new affidavit, consultation with expert on declaration for discovery motion is four hours. So those are some inconsistencies.

MR. BANKSTON: So -- okay. So some of that I need to -- in creating the affidavit for this

case went back and looked at what I did with my expert and in combination with the expedited discovery motion, and I think I have divided that time up differently than the first affidavit that I did in the second affidavit. So I believe, one, I was pretty conservative about it in my first affidavit. But in the second affidavit I believe I have some of my expert time actually with what we did on the motion.

THE COURT: But you understand all I have is affidavits, no additional testimony, and I found those --

MR. BANKSTON: No, I understand.

THE COURT: -- three inconsistencies. So I just have to do the best I can divining what that means.

MR. BANKSTON: Look, I'll make that part of it easy for you. If you have any conflicts with my affidavit, I play it like the lower number that I have is -- you can take that number.

THE COURT: Good answer. Thank you.

MR. BANKSTON: So I think there might be a couple like that on there that are like those because, again, we had some tasks that were all in one ball of wax. So please do just take the lower number on those. But with respect mainly to --

THE COURT: And you're down to the last couple of minutes.

MR. BANKSTON: Sure. And what I'll just say to conclude is that you see the quality of the motion and what we had to do to do it and you see everything that went into it beforehand. And there's this allegation that maybe I shouldn't have spent so much time preparing for a deposition of Alex Jones, which as I think you've seen from both transcripts are two qualitatively different depositions.

I believe that all the time that we spent was necessary and reasonable in this case, particularly because of the nature of the case and how heavily it's being litigated. So I believe in comparison to all the other affidavits in the case, this one is right in line with everything else from both sides. That's why we'd urge those attorneys' fees. Thank you, Your Honor.

THE COURT: Thank you. It's your turn.

MR. JEFFERIES: Yes, Your Honor. We're going to respond on attorneys' fees, specifically regarding the drafting of the motion for discovery abuse, the 54 cumulative motions by both attorneys -- or 54, yeah, total hours for both attorneys. And again, Judge, I would argue, you know, to refer to the quality of the motion. Again, I don't think they pointed to one

Rule 215 case that says you can bring in and incorporate into a 46-page motion with -- you know, 600 total with exhibits and that's proper under a 215 motion talking about other cases other than this one, much less a Connecticut case. And a majority of a portion of their brief deals with those types of issues. So I would request that the Court take that into consideration when looking at that number. I just think that is unnecessary. There's no basis in Texas law in my opinion for the Court to look at conduct outside of the conduct in this case under Rule 215, which is --

THE COURT: Can't you, though, look for a pattern and practice? And maybe you can't do sanctions for what happened in another case, but this is not an accident; this is a habit. It's almost like habit evidence, that you can't use evidence of what people did under other circumstances to prove they did it in this case. But on the other hand, if someone is habitually doing these things, it's something courts can consider. And when I think about the inability of Alex Jones to answer any questions about sources but saying, oh, I can find -- I didn't know I had to look for that, but I can go find that, and then you admit, and I appreciate it, the deposition of the corporate rep, Rob Dew, was completely useless, and it has been before. I mean, the

discovery before in other cases has been not forthcoming, even cases I've handled. So I don't know why I can't consider those things as part of the pattern.

MR. JEFFERIES: Fair enough, Judge. Part of the pattern, again under the *Brookshire* case, you know, one of the points it makes is that the plaintiff in this case shouldn't get the fruits of alleged improprieties in other cases, meaning they can't argue because of that alleged discovery abuse in other cases that Mr. Heslin in this *Heslin 2* case should get the benefit of that. And that's what they're asking for both under monetary sanctions and other sanctions from the Court. So anyway -- so again, I think that's, you know, Texas Supreme case law. You need to look at --

THE COURT: But I'm required to order attorneys' fees for anything that was incurred, including, of course, drafting the motion for sanctions, unless it's substantially justified, unless the resistance to this motion is substantially justified. I believe that's something along the lines of what the rule says. Am I right?

MR. JEFFERIES: Agreed. And I'm not questioning the Court's ability or authority to award

attorneys' fees. I'm questioning what's fair and reasonable given the *Brookshire* case, et cetera, that the plaintiff in this case shouldn't benefit from alleged bad acts in another case. The purpose of Rule 215 is to get corrective conduct in this case.

Again, the last thing would be going back to Mr. Bankston's, I guess, request to somehow have an order entered which would preclude my clients from putting on any source evidence they have in the future. Again, I made a representation to the Court. I'm actively going on that. I'm getting a handle on this. There's been an active flow of information. Again, this has been transcribed. There's a record here for the judge. But to do it now I would think is inappropriate, Your Honor, and I request that that order not be entered. Thank you, Judge.

THE COURT: All right. That concludes our record. I'm required to rule on this quickly. So by the middle of January I have to rule or it's overruled by operation of law, I believe, the motion to dismiss. So you'll get a ruling from me, and you'll get a ruling from me on the motion for sanctions. It will be in a single order. You can already tell some of the things I'm thinking about in light of what I did in *Heslin 1*. But I'll ruminate on that some more and decide how to

deal with all of the arguments you've made and what should be done at this juncture in the case.

Thank you again for your arguments and your briefing. That concludes our record.

(Court adjourned)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Chavela V. Crain, Official Court Reporter in and for the 53rd District Court of Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered in evidence by the respective parties.

WITNESS MY OFFICIAL HAND this the 21st day of January, 2020.

/s/ Chavela V. Crain

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Texas CSR 3064
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